Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

RICKIE L. REBER, TEX WILLIAM ATKINS, STEVEN PAUL THUNEHORST, and C.R.,

Petitioners,

v.

THE STATE OF UTAH,

Respondent.

On Petition For Writ Of Certiorari To The Utah Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioners, three adults and one minor, are members of an Indian tribe. While hunting on lands within the Indian reservation, they were cited and subsequently convicted in State court for poaching.

1. Should a jury have been able to determine whether the adult petitioners acted reasonably in relying upon published opinions of the 10th U.S. Circuit Court of Appeals?

2. Could the juvenile court delete intent as an element of the offense charged against the juvenile petitioner after receiving uncontested evidence that the juvenile acted at the direction of his father and in reliance upon federal court rulings?

3. Were the adult petitioners denied a fair trial due to bias on the part of the trial judge?

4. Did the Ute Partition Act expel the Uintah Band as a body from the Ute Tribe? Act of August 27, 1954, ch. 1009, 68 Stat. 868, 25 U.S.C. §§677-677aa.

5. Could the Ute Partition Act have any effect on the treaty rights of a person born prior to the Act who was not included on the termination roll prepared under the Act?

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PETITION FOR WRIT OF CERTIORARI

The Petitioners respectfully petition for a writ of certiorari to review the judgment of the Utah Supreme Court in *State of Utah v. Reber, et al.*

OPINIONS AND ORDERS

The opinion of the Utah Supreme Court is reported at 2007 UT 36, 576 Utah Adv. Rep. 21. App. 1-12. It was entered on April 24, 2007. The opinions of the Utah Court of Appeals are reported at 2005 UT App 485, 128 P.3d 1211, App. 13-21, and 2005 UT App 486. App. 22-23. They were entered on November 10, 2005. Petitions for rehearing before the Utah Court of Appeals were denied on March 2, 2006. App. 40, 41. The order of the Eighth District Juvenile Court of Utah, Uintah County, convicting the juvenile petitioner was entered on March 18, 2004. App. 24-30. The order of the Eighth Judicial District Court of Utah, Uintah County, granting the State's motion in limine was entered on January 21, 2004. App. 31-37. The order of the same court denying Petitioner's motion to disqualify the trial judge was entered on November 10, 2003. App. 38-39. The orders of the juvenile and district courts are unreported.

JURISDICTIONAL STATEMENT

This Court has jurisdiction to review the final judgment rendered by the highest court of a State pursuant to 28 U.S.C. §1257(a) where any title, right, privilege, or

immunity is specially set up or claimed under the Constitution, treaties, or statutes of the United States.

CONSTITUTIONAL AND OTHER PROVISIONS

United States Constitution,
Amendment XIV, Section 1

* * * No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Executive Order of October 3, 1861

Department of the Interior
Washington, October 3, 1861

SIR: I have the honor herewith to submit for your consideration the recommendation of the Acting Commissioner of Indian Affairs that the Uintah Valley, in the Territory of Utah, be set apart and reserved for the use and occupancy of Indian tribes.

In the absence of an authorized survey (the valley and surrounding country being as yet unoccupied by settlement of our citizens), I respectfully recommend that you order the entire valley of the Uintah River within Utah Territory, extending on both sides of said river to the crest of the first range of contiguous mountains on each side, to be reserved to the United States and set apart as an Indian reservation.

Very respectfully, your obedient servant,

CALEB B. SMITH, *Secretary.*

THE PRESIDENT.

EXECUTIVE OFFICE, *October 3, 1861*

Let the reservation be established, as recommended by the Secretary of the Interior.

A. LINCOLN

STATEMENT OF THE CASE

1. *Summary of Facts, Uintah Band.* Petitioners are members of the Uintah Band of Indians. R. 167-191. The Uinta Valley Reservation was created by Executive Order of President Abraham Lincoln on October 3, 1861. Congress confirmed this Order on May 5, 1864, stating that the Uinta Valley was "set apart for the permanent settlement and exclusive occupation of such of the different tribes of Indians of said [Utah] territory as may be induced to inhabit the same." Act of May 5, 1864, ch. 57, 13 Stat. 64. R. 123.

Upon creation of the reservation, the Department of the Interior set up the Uintah Agency to manage the affairs of the Uinta Valley Reserve. Those Indians of Utah Territory who gathered in the Uinta Valley and came under the jurisdiction of the Uintah Agency became known as the "Uintah Band." Few if any members of the Uintah Band were ethnically Ute. R. 151.

In 1881, the White River Band and the Uncompahgre Utes were brought to Utah under military escort from Colorado, having been previously divested of all lands within the continental United States. R. 152. Although the

Uintah Band, the White River Band, and the Uncompahgre Utes all reside on the present-day reservation within the State of Utah, all Indian rights in the Uinta Valley under the 1861 Order and the 1864 Act are those of the Uintah Band, inasmuch as neither the Whiterivers nor the Uncompahgres inhabited the reservation in 1861, nor are they "Indians of said [Utah] territory," as set forth in the Act of May 5, 1864. R. 232.

Moreover, the Uintah Band has always maintained a distinctly different culture and lifestyle from the other two bands. This included intermarriage with other tribes and non-Indians, and a higher standard of living and education. Accordingly, the Uintah Band has always been known throughout the reservation as the "Mixed-bloods." R. 419-425, App. 67-98. The separate rights of the separate bands have been recognized by various acts of Congress. R. 152.

In 1937, the three bands of Indians inhabiting the reservation adopted a constitution as the "Ute Indian Tribe of the Uintah and Ouray Reservation." R. 169. Nothing in the constitution empowered either the tribe as a whole or any of the three bands to determine the membership of any of the individual bands. By its own terms, the tribal constitution is subject to supervening federal law. App. 45.

Petitioner Rickie Reber was born on June 27, 1952. Petitioner Steve Thunehorst's mother, Leanna Chivers Thunehorst, was born on May 31, 1951. At birth, both Mr. Reber and Ms. Thunehorst were fully eligible for enrollment in the Ute Tribe as members of the Uintah Band. R. 153, 298, 581:10, 28.

On August 27, 1954, Congress passed the "Ute Partition Act" (68 Stat. 868) (hereinafter referred to as "the UPA"). The UPA was part of a policy engaged in by

Congress from 1953 to 1966 of "terminating" federal supervision over select Indian tribes. The policy has since been firmly renounced, commencing with President Richard Nixon's Special Message to the Congress on Indian Affairs in 1970. Pub. Papers 564 (Richard M. Nixon, July 8, 1970). R. 154.

Under the UPA, the tribe was directed to draw up two rolls, one consisting of "mixed-bloods" and the other of "full-bloods." The "mixed-bloods" were then to be terminated from federal supervision. App. 43-44. The UPA makes no mention whatsoever of the separate bands that up to that time constituted the Ute Tribe.[1] Nevertheless, of 490 persons included on the termination roll, 456 were members of the Uintah Band. App. 67-98, R. 226-251. Two hundred and eight members of the Uintah Band were included on the "full-blood" roll, and approximately 220 other Uintahs, including Mr. Reber and Ms. Thunehorst, were not included on either roll, but were nevertheless excluded thereafter from membership in the Ute Tribe. The ultimate effect of the UPA was thus to expel between 68.68 and 76.47% of the Uintah Band from the Ute Tribe. Cross-Petition to Utah Supreme Court, May 30, 2006, page 7; Brief of Cross-Petitioners, October 13, 2006, page 7; Reply Brief of Cross-Petitioners, December 18, 2006, page 2.

Pursuant to the Ute Constitution, the UPA would take precedence over any terms of that Constitution. App. 45. As a terminated tribe, the Uintah Band would thus no longer be a constituent band within the Ute Tribe.

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[1] With the exception of an oblique reference in 25 U.S.C. §677r. App. 44.

This *de facto* termination of the Uintah Band has had several unfortunate consequences. First, notwithstanding the Uintah Band has continued to maintain its tribal identity without federal supervision, the State of Utah, the Ute Tribe, and indeed, ev n the United States have insisted on only recognizing as Indian the diminishing rump portion of the Uintah Band still enrolled in the Ute Tribe. App. 11. Secondly, misguided members of the Uintah Band itself have expended a regrettable amount of time and resources attempting to assert rights under a Ute Constitution to which the Uintah Band is no longer a party (*See, e.g., United States v. Von Murdock*, 132 F.3d 534 (10th Cir. 1997)). Finally, and most significantly, under the color of the UPA, the State of Utah has assumed powers and jurisdiction over members of the Uintah Band vastly beyond those conferred under the Act. "Termination of the mixed-blood Utes, division and distribution of assets, and the organization of UDC under the Partition Act has spawned extensive litigation." *Hackford v. Babbitt*, 14 F.3d 1457, 1463 (10th Cir. 1994). Some excellent studies documenting this tragedy include *Termination's Legacy: The Discarded Indians of Utah* (R. Warren Metcalf, Lincoln, University of Nebraska Press, 2002), and *The Dispossessed: Cultural Genocide of the Mixed-Blood Utes* (Parker M. Nielson, Norman, University of Oklahoma Press, 1998).

In 2000, a group of Uintah Band members acting under the name Timpanogos Tribe sought injunctive relief against State wildlife officers for obstructing tribal hunting on tribal lands. In an interlocutory ruling, the 10th U.S. Circuit held that even terminated tribes nevertheless retain the right to hunt and fish on tribal lands. *Timpanogos Tribe v. Conway* (hereinafter "*Conway*"), 286 F.3d 1195, 1203 (10th Cir. 2002), *citing Menominee Tribe*

v. United States, 391 U.S. 404, 88 S.Ct. 1705, 20 L.Ed.2d 697 (1968). App. 64-65. The court also held that, as Indians of Utah Territory inhabiting the Uinta Valley, the plaintiffs had made out a prima facie case that they possessed the right to hunt and fish on the Reservation. *Id.* at 1204. App. 66.

2. *Summary of Facts, Uintah and Ouray Reservation*. Independent of any issues as between the Uintah Band and the Ute Tribe, the Ute Tribe itself has engaged in extensive litigation against the State of Utah regarding the respective limits of State and tribal jurisdiction. After a series of journeys back and forth between the federal district court and the 10th Circuit[2] (and one trip to this Court[3]) this litigation culminated in the 10th Circuit's holding in *Ute Indian Tribe of Uintah & Ouray Reservation v. Utah*, 114 F.3d 1513 (10th Cir. 1997), *cert. denied*, 522 U.S. 1107, 118 S.Ct. 1034, 140 L.Ed.2d 101 (1998) (*hereinafter Ute V*). App. 48-57.

In short, *Conway* recognized a right in terminated tribes to hunt and fish on Indian lands, while *Ute V* defined those lands.

3. *The Reber prosecution*. The *Conway* ruling was released in April, 2002. In October, 2002, fully aware of the

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[2] *Ute Indian Tribe of Uintah & Ouray Reservation v. Utah*, 521 F. Supp. 1072 (D.Utah 1981) (*Ute I*); *Ute Indian Tribe of Uintah & Ouray Reservation v. Utah*, 716 F.2d 1298 (10th Cir. 1983) (*Ute II*); *Ute Indian Tribe of Uintah & Ouray Reservation v. Utah*, 773 F.2d 1087 (10th Cir. *en banc* 1985), *cert. denied*, 479 U.S. 994, 107 S.Ct. 596, 93 L.Ed.2d 596 (1986) (*Ute III*); *Ute Indian Tribe of Uintah & Ouray Reservation v. Utah*, 935 F. Supp. 1473 (D.Utah 1996) (*Ute IV*).

[3] *Hagen v. Utah*, 510 U.S. 399, 114 S.Ct. 958, 127 L.Ed.2d 252 (1994).

10th Circuit's holding regarding terminated tribes (App. 58-66), Mr. Reber took his (then) 13-year-old son C.R. hunting on lands they knew to be defined as Indian under *Ute V*. Although C.R. was able to shoot his first buck, it was confiscated shortly thereafter by State wildlife officials, who charged C.R. in Utah's Eighth District Juvenile Court, Uintah County, with "Wanton Destruction of Protected Wildlife," i.e., poaching. R. C.R. 30-31. Mr. Reber was charged in the Eighth District Court, Uintah County, with Aiding and Abetting in the Wanton Destruction. Since the spread of the deer's antlers exceeded 24 inches, the animal constituted a trophy buck, and the offense was elevated to a third degree felony against both father and son. App. 2, R. 2-3.

Petitioners Atkins and Thunehorst shot a smaller deer the following month in a separate location, albeit still within the reservation as defined under *Ute V*, and fully aware of the holdings in both *Ute V* and *Conway*. R. Atkins 73-107, Thunehorst 74-109. Both men were charged with Wanton Destruction of Protected Wildlife, a Class A Misdemeanor. The cases were assigned to the same judge hearing Mr. Reber's case, and both Petitioners subsequently stipulated to be bound by the trial court's pretrial rulings in the *Reber* case. App. 3.

In the trial court, the point of contention was the distinction between the rights of Indian *tribes*, on the one hand, and those of *individual* Indians, on the other. The Petitioners maintained that Indian status derives *either* from membership in an Indian tribe *or* from blood quantum. *Zarr v. Barlow*, 800 F.2d 1484 (9th Cir. 1986). R. 178-180. The Petitioners never claimed the right to hunt on any other basis than as members of the Uintah Band. They asserted that once an Indian tribe acknowledges persons as members, the sole question remaining for the

court is whether the *tribe* holds rights, *not* whether the defendants are Indians. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72, n.32, 98 S.Ct. 1670, 1684, n.32, 56 L.Ed.2d 106 (1978) (Tribe retains the sovereign right to determine its own membership). R. 178-180.

In contrast, the trial judge would accept no argument or evidence either from or regarding the Uintah Band, insisting that the Petitioners must prove their status as Indians individually or not at all. R. 260-265. Indeed, the trial judge stated at the outset that he was under no obligation to follow federal law. App. 99-105. When it became apparent that the judge was as good as his word on this point, the Petitioners moved to have him disqualified. R. 276-292, App. 38-39.

At the trial court's request, the parties briefed the effect of the UPA on the rights of the Petitioners. R. 580:43. Since Mr. Reber was born two years prior to enactment of the UPA and was never included on the termination roll, he contended that it had no effect on his rights at all. R. 180-181. The trial court rejected this argument, implying that hunting and fishing rights could not be inherited, but termination could be. R. 260-265.

Mr. Reber attempted to introduce evidence that he could not possess criminal intent if he possessed a good faith belief that he was not committing a crime, and that that belief was based upon a reasonable reading of published court rulings by a court of competent jurisdiction. App. 47, R. 305-309. The trial court prohibited all such evidence, holding that any reliance by the Petitioners upon *Ute V* or *Conway* was "unreasonable as a matter of law," App. 36-37.

Notwithstanding his best efforts, Mr. Reber was prohibited from putting on any defense evidence at all, and the jury convicted him in less than seven minutes.

R. 548:168-196. When Mr. Atkins and Mr. Thunehorst were likewise prohibited from presenting any evidence as to their reliance upon *Ute V* and *Conway*, they agreed to plea to reduced charges on condition that their right to appeal be reserved. App. 3.

In the juvenile court, C.R. was charged under the same statute as was his father in the district court. C.R. was more successful in introducing evidence that he had acted in reliance upon his father, who had acted in reliance upon the holdings of the 10th Circuit. In response, subsequent to trial, the trial judge asserted a distinction between "willful" and "scienter," found that "scienter" was not an element of a statute unrelated to the one under which C.R. was charged, and proceeded to convict C.R. The juvenile court stayed sentencing until the outcome of all appeals. App. 24-30.

4. *Utah Court of Appeals Decision.* In response to the Petitioners' appeal to the Utah Court of Appeals, the State of Utah promptly conceded that the Petitioners *were* in fact on Indian land. The Court of Appeals thus vacated both the adult and juvenile convictions, finding that under *Ute V*, the Ute Tribe was the victim of the crime, and the State was thus divested of jurisdiction. App. 17. Interestingly, both the State of Utah and the Court of Appeals considered themselves bound by the very 10th Circuit ruling upon which the trial court found it "*unreasonable* as a matter of law" for the Petitioners to rely. App. 36. (Emphasis added).

The Petitioners fully briefed the Court of Appeals on the issues of reasonable reliance (adult case) and scienter (juvenile), as well as the rights of persons born prior to the UPA yet not included on the termination roll. Due to its

threshold finding on jurisdiction, the Court of Appeals found it unnecessary to address these issues. App. 17. Unfortunately, the court based its jurisdictional finding on an assertion that the Uintah Band has no existence independent of the Ute Tribe. App. 17. In short, the court had come to the right conclusion for the wrong reason. The Petitioners thus cross-appealed to the Utah Supreme Court to question how the Uintah Band could fail to have an independent existence when the UPA expelled well over two thirds of its membership from the Ute Tribe.

5. *Utah Supreme Court Decision.* The Utah Supreme Court did not dispute that *Ute V* was applicable, nor did it find reliance thereon to be "unreasonable as a matter of law." ("[T]he language of *Ute Tribe V* gives us pause." App. 6.) Rather, the Court was influenced by three other factors: (1) In the Ute Tribe's zeal to defeat the Uintah Band, the Ute Tribe actually appeared before the court and renounced the very jurisdiction otherwise accorded to it under *Ute V*,[4] App. 7; (2) Rather than finding the Ute Tribe to be a victim, the Utah Supreme Court found the crimes to be victimless, App. 8; and (3) the court apparently recognized no distinction between federal treaty rights (reserved even to terminated tribes) and federal recognition (withdrawn from the Uintah Band by the UPA). App. 11, n.28.

Although the Utah Supreme Court did not reject *Ute V* as had the trial court, it did not address the separate due process question as to whether a jury should have

[4] At no time have either the Ute Tribe or the State of Utah ever complied with the requirements for relinquishing and acceding to jurisdiction under 25 U.S.C. §§1321(a), 1324, and 1326. R. 21-23.

determined the factual element of intent. Given the opportunity either to sustain the Utah Court of Appeals' holding on this alternative basis or remand the matter to the trial court, the Utah Supreme Court did neither. The State's appellate courts have thus implicitly sustained a trial ruling directly in conflict with this Court's precedents regarding due process.

REASONS FOR GRANTING THE PETITION

The Petitioners have yet to present their reasonable reliance defense to a jury, even though two appellate courts have found one of the rulings not only reasonable, but binding. But more importantly, no federal court has ever addressed the effect of the Ute Partition Act on the Uintah Band, nor its effect on those persons excluded from the termination rolls who were living at the time of its enactment. As the potential for friction between the Uintah Band, the Ute Tribe, and the State of Utah continues to grow, the need for a clear judicial interpretation of the UPA becomes ever more urgent.

A. The trial court's order prohibiting the Respondents from presenting evidence of reasonable reliance on published court opinions directly contradicts the holdings of this Court regarding due process of law.

Conway stated that even terminated tribes retain hunting rights. App. 64-65. *Ute V* defined Indian lands within the reservation. App. 49-57. Relying on *Conway* and *Ute V*, the Petitioners believed that as members of the Uintah Band they could hunt on reservation lands. They

were subsequently charged and convicted of being non-Indians poaching on non-Indian lands.

This Court has held that a person cannot be convicted of a crime if they undertook the prohibited conduct in reasonable reliance upon a published interpretation of the law. *United States v. Caceres*, 440 U.S. 741, 753 n.15, 99 S.Ct. 1465, 1472 n.15, 59 L.Ed.2d 733 (1979). The defense of mistake of law is based on the due process clause contained in the Fifth and Fourteenth Amendments to the U.S. Constitution. *Cox v. Louisiana*, 379 U.S. 559, 571, 85 S.Ct. 476, 484, 13 L.Ed. 487 (1965); *Bouie v. City of Columbia*, 378 U.S. 347, 354, 84 S.Ct. 1697, 1703, 12 L.Ed.2d 894 (1964). The Utah legislature has codified this rule as Section 76-2-304(2) of the Utah Code. App. 47.

The trial court had already declared that it was not bound by either *Ute V* or *Conway* (App. 99-105), that the Petitioners were not Indians, and that they were not on Indian land. R. 260-265. However, even accepting this as the "Law of the Case," the Petitioners were still entitled to show the jury, *not* that *Ute V* or *Conway* were the law, but that the Petitioners were *reasonable* in *believing* that they were Indians hunting on Indian land based on their reading of *Ute V* and *Conway*. R. 305-309. The issue here is not whether the rulings are or are not correct, but whether the Petitioners were deprived of their right to have a jury determine the factual element of reasonableness. *Pennsylvania Co. v. United States*, 236 U.S. 351, 361, 35 S.Ct. 370, 373, 59 L.Ed. 616 (1915) (reasonableness is a question of fact). Both the Utah Court of Appeals and the Utah Supreme Court have vindicated the Petitioners' belief in the authority of *Ute V*, but neither of these courts have accorded the Petitioners the opportunity to have their defense heard by an impartial jury.

Moreover, the trial court's rejection of the 10th Circuit's precedents does not stand in isolation. As was pointed out at the trial level, to the Utah Court of Appeals, and to the Utah Supreme Court, the Uintah people have had long experience being told by this trial judge that they are not who they are. R. 280-292; 578:3-5; 579:6-10; 580:14-28; 581:28-35; 583:4-5; 584:10-11, 13, 74, 109-120, 125, 150, 168-169, 172-175, 190-195. The Petitioners were denied a fair trial due to bias on the part of the trial judge, and the Utah Supreme Court has compounded this inequity by failing to remedy it.

The adult Petitioners were simply prohibited from challenging the State's case as to intent. In the juvenile Petitioner's case, the court removed intent from the elements of the offense *ex post facto*. If intent can be inferred from conduct, it seems safe to infer that the trial courts did not intend for any of the Petitioners to receive a fair trial.

This Court needs to send a clear message to the State of Utah that due process of law includes (1) the right to have a jury determine each and every factual element of a crime, including whether the defendant's good faith reliance upon published federal rulings negates the element of intent; (2) the right to be tried before an impartial judge; and (3) the right to be tried on the same offense for which one has been charged and defended.

B. The effect of the Ute Partition Act on the Uintah Band is an important question of federal law which has never been addressed by a federal court and which the State courts have no authority to determine.

Whether the UPA terminated 68.68% or 76.47% of the Uintah Band from the Ute Tribe, there is no question that

the majority of the Uintah Band was terminated from federal supervision under the Act. The question thus arises how any body politic can exist other than where the majority of its members are found. It is clear that a band that acts independently of a tribe is no longer a part of that tribe. *Montoya v. United States*, 180 U.S. 261, 269-270, 21 S.Ct. 358, 361-362, 45 L.Ed. 521 (1901). The UPA has rendered the Uintah Band independent from the Ute Tribe by sheer force of the numbers involved.

Remarkably, although the numbers have been well known since the time the termination rolls were drawn up in 1956, the effect of the UPA on the Uintah Band has never been addressed by a federal court. The issue was laid before the Utah Supreme Court, and while that court correctly held that it did not have the authority to determine the Uintah Band's eligibility for federal benefits, it incorrectly assumed that Petitioners were seeking such eligibility. App. 11. Hunting rights are not a federal benefit. They are a treaty right unaffected by any termination act. *Menominee Tribe v. United States*, 391 U.S. 404, 412-413, 88 S.Ct. 1705, 1711, 20 L.Ed.2d 697 (1968).

In refusing to recognize the rights retained by the Uintah Band, the Utah Supreme Court ignored important precedents and rules of construction set forth by this Court and the 10th Circuit Court of Appeals. This Court has held that any ambiguities in an act affecting Indians' rights must be interpreted in favor of the Indians. *Bryan v. Itasca County*, 426 U.S. 373, 392, 96 S.Ct. 2102, 2112, 48 L.Ed.2d 710 (1976). As between the Ute Tribe and the Uintah Band, the 10th Circuit has held that this rule of construction should be specifically applied in favor of those terminated under the UPA. *United States v. Felter*, 752 F.2d 1505, 1511 (10th Cir. 1985).

In summary, the effect of the UPA on the Uintah Band is an important question of federal law which has not been, but ought to be, decided by this Court, and which the Utah Supreme Court addressed in a manner contrary to the governing precedents established by this Court and the 10th Circuit.

C. The effect of the Ute Partition Act on persons born prior to its enactment yet omitted from the termination rolls is an important question of federal law which has never been addressed by a federal court and which the trial court decided contrary to the relevant federal authorities.

Quite independent of the UPA's devastating effects on the Uintah Band, no federal court has ever taken up what effect, if any, the UPA could have on persons born prior to its enactment yet excluded from either roll. This group, and their descendants, represent a sizeable and growing number of persons whose fate under the UPA remains undetermined.

Ironically, in 1955, at the very height of the termination fever, the U.S. Solicitor opined that no authority existed to place children on the termination roll not otherwise already there. Indeed, he gave it as his opinion that it was the intent of the UPA to actually break up families. App. 106-107. Confronted with the question, the State trial court imputed termination to all such persons, contrary to the suggestion of the 1955 memorandum, and indeed, contrary to the canons of construction set forth by this Court and the 10th Circuit Court of Appeals. *Bryan v. Itasca County*, *supra*; *United States v. Felter*, *supra*. R. 260-265.

It is important that this Court address this question, not only to correct the error of the trial court, but to clarify the status and future of the substantial number of persons whose tribal rights and heritage are at stake.

D. A dispositive ruling by this Court as to the effects and limits of the Ute Partition Act would bring an end to over 50 years of protracted litigation.

A grave injustice has been committed here. A termination act has been extended beyond its scope to not only terminate federal benefits, but to strip an entire people of their heritage, their identity, and their treaty rights. No other termination act has ever been so construed, and nothing in this termination act gives it such power. The UPA must be limited to its actual terms. Those terms were merely to terminate federal supervision over the Uintah Band, not to terminate its existence and appropriate its name and rights to two rival tribes. Likewise, the UPA could not extinguish the tribal rights of persons excluded from the termination rolls completely. By addressing these timely questions, this Court can finally bring an end to over 50 years of fractious litigation.

CONCLUSION

It is as important to understand what this case is not about as well as what it is. This Petition is *not* a challenge to the validity of the Ute Partition Act, but only a request that the Act be limited to its actual terms under the law.

Likewise, this Petition is *not* a backhanded attempt to obtain federal recognition for the Uintah Band, but merely

an effort to uphold those treaty rights reserved to all terminated tribes, and which remain unaffected by Termination Era legislation.

Finally, this Petition is *not* an effort to either challenge or vindicate the 10th Circuit's holdings in *Ute V* and *Conway*, but merely to determine whether the Petitioners' reliance upon those rulings should have been submitted to a jury.

For the reasons stated herein, Petitioners request that certiorari be granted as to the questions set forth in this Petition.

Respectfully submitted,

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IN THE SUPREME COURT OF THE STATE OF UTAH

State of Utah,
Plaintiff, Petitioner, and
Cross-Respondent,

v.

Rickie L. Reber; Tex William Atkins;
and Steven Paul Thunehorst,
Defendants, Respondents, and
Cross-Petitioners.

No. 20060299

State of Utah, in the interest of C.R.,
a person under 18 years of age.

No. 20060304

FILED
April 24, 2007

Eighth District, Vernal Dep't
The Honorable A. Lynn Payne
No. 021800320

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On Certiorari to the Utah Court of Appeals

WILKINS, Associate Chief Justice:

¶1 The State seeks review of the court of appeals' decision vacating the convictions of Defendants Reber,

Thunehorst, and Atkins. Reber was convicted of aiding or assisting in the wanton destruction of protected wildlife in violation of Utah Code sections 23-20-4 and -23. Thunehorst and Atkins were each convicted of attempted wanton destruction of protected wildlife. The juvenile case against Reber's son, C.R., has been consolidated with this case for purposes of review.

¶2 In vacating the convictions, the court of appeals concluded that the State lacked jurisdiction. We disagree, and accordingly reverse.

BACKGROUND

¶3 During the 2002 deer hunting season, Reber's son shot and killed a large mule deer with Reber's assistance. While transporting the deer, Reber was stopped at a checkpoint in Uintah County where the Utah Division of Wildlife Resources was checking for chronic wasting disease in deer. Conservation officers saw the large buck in the truck bed with no state hunting permit, license, or tag attached to the animal. Because Reber's son, C.R., had killed a trophy buck, the State charged Reber with aiding and assisting in the wanton destruction of wildlife, a third degree felony under Utah Code section 23-20-4(3)(a). C.R. was referred to juvenile court.

¶4 During the same hunting season, Atkins shot a buck in Uintah County, and Thunehorst assisted him. They were both charged with class A misdemeanors under Utah Code section 23-20-4(3)(b).

¶5 Reber filed a motion to dismiss his case, claiming that he is an Indian and was hunting in Indian country and that the State therefore lacked jurisdiction over him.

Atkins and Thunehorst made the same claims but stipulated that the district court's ruling on Reber's motion would apply to their cases.[1] The district court denied Reber's motion, and a jury convicted him. Atkins and Thunehorst entered conditional pleas to class B misdemeanors. All three adult parties appealed to the Utah Court of Appeals, and their appeals were consolidated. C.R., also asserting a lack of State jurisdiction, was adjudicated delinquent on the same basis. He also seeks review.

¶6 The court of appeals vacated the convictions. The court noted that a state has jurisdiction over crimes that occur in Indian country only if neither the defendant nor the victim is Indian. The court of appeals determined that because the crimes did in fact occur in Indian country, and because the Ute Indian Tribe was the victim of the crimes, the State lacked jurisdiction. Having already determined that the State lacked jurisdiction, the court of appeals did not reach defendants' Indian status claims.

¶7 We granted certiorari to determine whether, due to either a regulatory interest over hunting or a property interest in wildlife, the Ute Indian Tribe is a victim of illegal hunting within Indian country. We also granted certiorari to determine whether Defendants have sufficiently demonstrated that they are Indians and, as such, are outside the jurisdiction of the State for acts committed in Indian country.

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[1] Because Thunehorst and Atkins stipulated that rulings made with respect to jurisdiction and Indian status in Reber's case would be binding on them, we base our analysis on the facts in Reber's case.

STANDARD OF REVIEW

¶8 On certiorari, we review the decision of the court of appeals, not that of the the trial court.[2] Whether the district court or the juvenile court has jurisdiction is a question of law that we review for correctness, giving no deference to the lower court.[3]

ANALYSIS

¶9 All parties agree that the land on which the crimes occurred in this case was part of Indian country as defined by federal statute.[4] The United States Supreme Court has described the extent to which states may exercise jurisdiction over crimes committed in Indian country. "Within Indian country, state jurisdiction is limited to crimes by non-Indians against non-Indians and victimless crimes by non-Indians."[5] This crime was not committed against a "non-Indian." Either the acts charged here are victimless, or the victim is the Ute Indian Tribe. Consequently, the State has jurisdiction only if Defendants are non-Indians and if this was a victimless crime.

¶10 The court of appeals concluded that "[b]ecause Defendant's acts of hunting on Indian country affected the Ute Tribe's regulatory interest, the tribe is the victim."[6]

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[2] *State v. Norris*, 2007 UT 6, ¶ 10, 152 P.3d 293.

[3] *Id.*

[4] 18 U.S.C. § 1151 ("[T]he term 'Indian country' . . . means all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation. . . . ").

[5] *Solem v. Bartlett*, 465 U.S. 463, 465 n.2 (1984) (citation omitted).

[6] *State v. Reber*, 2005 UT App 485, ¶ 11, 128 P.3d 1211.

The court also suggested that, in addition to the regulatory interest, "[a]n argument might also be made that the Ute Tribe had a property interest in the wildlife" sufficient to make it a victim.[7] We disagree and conclude that Defendants are non-Indians who committed a victimless crime within Indian country but not on Indian land and that, therefore, the State has jurisdiction.

I. DEFENDANTS' ACTIONS CONSTITUTE A VICTIMLESS CRIME

A. The Ute Tribe's Regulatory Interests Were Not Violated

¶11 All parties agree that the animals were killed in Indian country. Indian country is defined by Congress in 18 U.S.C. section 1551 as lands within the historic tribal boundaries. Indian country today may, and often does, include lands lawfully held in fee by non-Indians, as well as lands held by tribes, Indians individually, or others in trust for Indians. It may also contain, as in this instance, federal lands under the auspices of the Bureau of Land Management or the National Forest Service.

¶12 With respect to the Indian country border that encompasses the scene of these crimes, and the character of the contained land, there has been much litigation. Defendants argue that under the most recent decision on this issue, *Ute Indian Tribe of Uintah & Ouray Reservation v. Utah* ("*Ute Tribe V*"),[8] the State of Utah has no jurisdiction in this case. It does, in fact, appear that *Ute*

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[7] *Id.* at n.3

[8] 114 F.3d 1513 (10th Cir. 1997).

Tribe V offers support for Defendants' position. In that case, the United States Circuit Court for the Tenth Circuit states, "[T]he Tribe and the federal government retain jurisdiction over all trust lands, the National Forest Lands, [and] the Uncompahgre Reservation. . . .[9] The State [has] jurisdiction over the fee lands removed from the Reservation under the 1902-1905 allotment legislation."[10]

¶13 Were we to accept Defendants' reading of *Ute Tribe V,* the State of Utah would be without jurisdiction, since it is undisputed that the crimes took place within the original boundaries of the Uncompahgre Reservation. However, the crime scene was either on lands owned by the State or on National Forest land, miles from the nearest land owned by any Indian or Indian tribe. Nevertheless, the language of *Ute Tribe V* gives us pause.

¶14 Fortunately, the United States Supreme Court has given further guidance. In *Montana v. United States,*[11] the Court held that an Indian tribe's authority to regulate fishing and hunting "only extend[s] to land on which the Tribe 'exercises absolute and undisturbed use and occupation'" and "that power cannot apply to lands held in fee by non-Indians."[12]

¶15 We are compelled to read *Montana* to say that there is a jurisdictional difference between "Indian country"

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[9] The Uncompahgre Reservation is now the southern section of today's Uintah and Ouray reservation. *United States v. Von Murdock,* 132 F.3d 534, 540 (10th Cir. 1997).

[10] *Ute Tribe V,* 114 F.3d at 1530.

[11] 450 U.S. 544 (1981).

[12] *Id.* at 558-59.

and "Indian lands" or "Indian property owners."[13] The Court concluded that "[s]ince regulation of hunting and fishing by nonmembers of a tribe on lands no longer owned by the tribe bears no clear relationship to tribal self-government or internal relations, the general principles of retained inherent sovereignty [do] not authorize" a tribe to adopt a resolution regulating hunting and fishing.[14] In other words, the Ute Tribe has no regulatory authority to be offended by acts of Defendants here because the acts did *not* take place on Indian land over which the tribe claimed, or could claim, regulatory authority over hunting and fishing.[15]

¶16 Although the crimes in this case took place in Indian country, it is undisputed that the land on which the crimes took place is not owned by any Indian or Indian tribe. Because the Supreme Court has held that Indian tribes have no authority to regulate hunting and fishing on non-Indian-owned land, we must conclude that the Ute Tribe has no regulatory interest over hunting by non-Indians on this land.[16] As such, the court of appeals incorrectly relied on that regulatory interest as the basis for concluding that the Ute Tribe was a victim.

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[13] *Id.* at 563 n.12.

[14] *See id.* at 564-65.

[15] Further, in *Solem v. Bartlett*, the Supreme Court indicated that states have jurisdiction over victimless crimes committed by non-Indians in Indian country. 465 U.S. 463, 465 n.2 (1984). This crime fits that categorization.

[16] The Ute Tribe, present and represented by counsel as amicus before us, disclaimed any such regulatory interest.

B. The Ute Tribe's Property Interests Were Not Violated

¶17 In addition to having no regulatory interest in hunting on the land in question, the Ute Tribe has no property interest in living, roaming wildlife on the land. Again, we rely upon the authority of the United States Supreme Court. The Court has said that

> it is pure fantasy to talk of "owning" wild fish, birds, or animals. Neither the States nor the Federal Government, any more than a hopeful fisherman or hunter, has title to these creatures until they are reduced to possession by skillful capture.[17]

¶18 Federal courts have applied the same analysis to Indian tribes: "The fact that fish and game are presently upon an Indian reservation does not negate the state interest in conserving them. . . ."[18] Moreover, "[a] tribe cannot claim to 'own' the fish and game on the reservation."[19] And if not on Indian land, then surely not on non-Indian-owned land. Accordingly, Defendants' acts did not violate any property interest of the Ute Tribe in the wildlife.

¶19 Because the Ute Tribe neither has, nor claims, authority to regulate hunting on the land within Indian country at issue in this case, and because the Tribe also has no protected property interest in wildlife, the Ute Tribe is not, and cannot be, a victim of these crimes. Other

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[17] *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 284 (1977).

[18] *White Mountain Apache Tribe v. Arizona, Dep't of Game & Fish*, 649 F.2d 1274, 1283 (9th Cir. 1981).

[19] *Id.*

than the wildlife itself, these crimes have no victims. These are, then, victimless crimes within Indian country but not on Indian land.

II. DEFENDANTS FAIL TO ESTABLISH THAT THEY ARE INDIANS

¶20 Defendants claim to be Indians. We conclude that they are not, as that term has been defined by federal law.

¶21 In the 1846 decision *United States v. Rogers,*[20] the Supreme Court established factors to be evaluated in determining Indian status. Courts, including ours, have concluded that under *Rogers,* in order to claim the status of an Indian, a person must "(1) [have] a significant degree of Indian blood *and* (2) [be] recognized as an Indian by a tribe or society of Indians or by the federal government."[21] Defendants do not meet either of these requirements.

¶22 In applying the *Rogers* factors, we recognized in *Perank* that a person "with less than one-half Indian blood [can qualify as having] a significant degree of Indian blood."[22] However, we have found no case in which a court has held that 1/16th Indian blood, as claimed by defendants, qualifies as a "significant degree of Indian blood."

¶23 Even were we to conclude that 1/16th Indian blood meets the requirement in *Rogers,* defendants would still fail to establish their Indian status. Defendants'

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[20] 45 U.S. (4 How.) 567 (1846); *see State v. Perank,* 858 P.2d 927, 932 (Utah 1992).

[21] *Perank,* 858 P.2d at 932 (emphasis added).

[22] *Id.* at 933.

ancestors, through which they claim Indian blood, were individually listed on the Ute Partition Act final termination roll.[23] In *United States v. Von Murdock*,[24] the United States Court of Appeals for the Tenth Circuit, in addressing the operation and effects of the Ute Partition Act, concluded that an individual born to "parents [who] were listed on the final roll [of the Act]" was "not a member of the Ute Indian Tribe."[25] "'Nor can the children of a terminated [parent] claim membership in the tribe through [that] parent.'"[26] Because Defendants' ancestors lost their legal status as Indians, Defendants have no Indian blood for purposes of being recognized by an Indian tribe or the federal government. They therefore fail the first element of the *Rogers* test.

¶24 Defendants also fail the second element of the *Rogers* test. The Uintah Band, in which they claim membership, is not recognized as a tribe by the federal government. As a consequence, Defendants' claimed membership in that tribe does not help establish their Indian status under federal law. The 10th Circuit directly addressed this impact in *Von Murdock,* saying,

> The [Ute Tribe] Constitution thus makes clear that the Bands ceased to exist separately outside the Ute tribe, that jurisdiction over what was formerly the territory of the Uintah Band was to be exercised by the Ute Tribe, and that the rights formerly vested in the Uintah Band were to be

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[23] 25 U.S.C. § 677.

[24] 132 F.3d 534 (10th Cir. 1997).

[25] *Id.* at 536.

[26] *Id.* (quoting *Chapoose v. Clark,* 607 F. Supp. 1027 (D. Utah 1985)).

> defined by the Ute Constitution and exercised by the Ute Tribe. In light of these provisions, [the] argument that the Uintah Band's hunting and fishing rights retain a separate existence and belong only to the Uintah Band is groundless. Even if . . . the Uintah Band continues to maintain its own identity, under the Ute Constitution the Band does so only within the context of the Ute Tribe.[27]

¶25 This same analysis applies to the defendants in this case. Defendants concede that they are not members of the Ute Tribe. They claim to be members of the Uintah Band or Tribe. However, under federal law, the Uintah Tribe no longer has a separate existence apart from the Ute Tribe. As a result, Defendants do not belong to a federally recognized tribe and are not Indians under federal law.

¶26 We are bound by the determinations of the United States Supreme Court and the *Rogers* decision. Further, we are not at liberty to decide which individuals are or should be "recognized as an Indian" by Indian tribes or the federal government. Such recognition is at the discretion of those entities.[28] We conclude that, under *Rogers,* Defendants have failed to establish that they are Indians. Defendants do not have "a significant degree of Indian blood," nor are they "recognized as . . . Indian[s] by

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[27] *Id.* at 541.

[28] If an individual wishes to establish Indian status before this court, he must seek recognition as an Indian from a recognized Indian tribe. If, as is the case here, an entire tribe seeks to be recognized, the tribe must look to the federal government for recognition. Absent federal approval, we are not in the position to recognize new tribes, and we must, in accordance with *Rogers,* find against Indian status.

a [federally recognized] tribe or society of Indians or by the federal government."[29]

CONCLUSION

¶27 The State has jurisdiction over these defendants. A state has jurisdiction over crimes committed in Indian country when a non-Indian commits a victimless crime. Defendants are not Indians, as that term has been defined by federal law, and the crimes in these cases were victimless. Accordingly, we reverse the decision of the court of appeals and reinstate the convictions.

¶28 Chief Justice Durham, Justice Durrant, Justice Parrish, and Justice Nehring concur in Associate Chief Justice Wilkins' opinion.

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[29] *Perank*, 858 P.2d at 932.

IN THE UTAH COURT OF APPEALS

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State of Utah, Plaintiff and Appellee, v. Rickie L. Reber, Steven Paul Thunehorst, and Tex William Atkins, Defendants and Appellants.	)	OPINION Case No. 20040371-CA FILED (Nov. 10, 2005)
Ute Indian Tribe, Amicus Curiae.	)	

Eighth District, Vernal Department, 021800320
The Honorable A. Lynn Payne

Attorneys: Michael L. Humiston, Heber City, for Appellants
Mark L. Shurtleff and Joanne C. Slotnik, Salt Lake City, for Appellee
Kimberly D. Washburn, Draper, Tod J. Smith, Boulder, Colorado, and Charles L. Kaiser, Charles A. Breer, and Peter J. Hack, Denver, Colorado, for Amicus Curiae

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Before Judges Bench, Davis, and Orme,

BENCH, Associate Presiding Judge:

¶1 Defendant Reber appeals his conviction for one count of aiding or assisting in wanton destruction of protected wildlife, a third degree felony in violation of Utah Code sections 23-20-4 and -23. *See* Utah Code Ann. §§ 23-20-4,

-23 (2003 & Supp. 2005). Defendants Thunehorst and Atkins appeal their conditional pleas of attempted wanton destruction of protected wildlife, a class B misdemeanor. *See id.* We vacate each conviction for lack of state jurisdiction.

BACKGROUND

¶2 During the 2002 deer hunting season in Uintah County, Reber's son shot and killed a large mule deer with Reber's assistance. Later, Reber drove his truck through a Utah Division of Wildlife Resources checkpoint with the trophy buck in the bed of the truck. They did not have a state permit, license, or tag attached to the animal. The State charged Reber with aiding and assisting in the wanton destruction of wildlife. Because Reber's son shot a trophy buck, the crime constituted a third degree felony. *See* Utah Code Ann. § 23-20-4(3)(a). During that same hunting season, Defendant Atkins shot a buck in Uintah County and Defendant Thunehorst assisted him. They were both charged with class A misdemeanors. *See id.* § 23-20-4(3)(b).

¶3 Reber filed a motion to dismiss his case for lack of jurisdiction, claiming that he is an Indian and was hunting in Indian Country. Atkins and Thunehorst stipulated with the State that the district court's ruling on jurisdiction in Reber's case would apply to their respective cases. The district court denied Reber's motion, and the jury convicted him. Atkins and Thunehorst entered conditional pleas to class B misdemeanors. Defendants separately appealed, and the Atkins and Thunehorst appeals were consolidated with the Reber appeal.

ISSUE AND STANDARD OF REVIEW[1]

¶4 Defendants assert that the State lacked jurisdiction. Jurisdiction is a question of law, reviewed for correctness, and we accord no particular deference to the district court's decision. *See Skokos v. Corradini,* 900 P.2d 539, 541 (Utah Ct. App. 1995).

ANALYSIS

¶5 Defendants claim that the State lacked jurisdiction because they are Indians who exercised federally protected rights on Indian land. The Utah Constitution provides:

> The people inhabiting this State do affirm and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries hereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes, and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States.

Utah Const. art. III. Therefore, the federal government has jurisdiction over Indian lands until the Congress of the United States relinquishes such right. *See id.*

¶6 The State of Utah may assert "jurisdiction over Indians and Indian territory, country, and lands or any

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[1] Defendants raise and address other issues not covered in this opinion. Because we conclude that the State did not have jurisdiction, we need not address the other issues.

portion thereof within this state in accordance with the consent of the United States given by the Act of Congress of April 11, 1968, 82 Stat. 78-80 (Public Law 284, 90th Congress), to the extent authorized by that act and this chapter." Utah Code Ann. § 9-9-201 (2003). Utah Code section 9-9-213 provides for concurrent state and federal jurisdiction over hunting on reservations. *See* Utah Code Ann. § 9-9-213 (2003). In order for section 9-9-213 to apply, and thus allow the State to assert jurisdiction, certain preliminary requirements must be met. Pursuant to Utah Code section 9-9-202,

> [s]tate jurisdiction acquired or retroceded pursuant to this chapter with respect to criminal offenses or civil causes of action shall be applicable in Indian country only where the enrolled Indians residing within the affected area of the Indian country accept state jurisdiction or request its retrocession by a majority vote of the adult Indians voting at a special election held for that purpose.

Utah Code Ann. § 9-9-202 (2003). The court in *United States v. Felter*, 752 F.2d 1505, 1508 n.7 (10th Cir. 1985), noted that "[u]nder current law, Indian tribes must consent to any state assumption of jurisdiction over 'Indian Country.' Although Utah since has indicated its willingness to assume this jurisdiction, no Indian tribe has accepted its offer." *Id.* There is no evidence in the record that the Ute Tribe has held an election accepting state jurisdiction. Thus, section 9-9-213, granting concurrent jurisdiction over hunting, cannot apply.

¶7 Both parties agree that the crimes in this case, hunting without a state license, occurred in "Indian Country." "Under 18 U.S.C. § 1151, the Tribe and the

federal government have civil and criminal jurisdiction over 'Indian Country.'" *Ute Indian Tribe v. Utah,* 114 F.3d 1513, 1529 (10th Cir. 1997) (*Ute Tribe V*). Without the election mentioned above, "state jurisdiction over crimes committed in Indian Country is limited to criminal acts committed 'by non-Indians against non-Indians . . . and victimless crimes by non-Indians.'" *State v. Valdez,* 2003 UT App 60,¶4, 65 P.3d 1191 (alteration in original) (quoting *Solem v. Bartlett,* 465 U.S. 463, 465 n.2 (1984)). If either the defendant or the victim is an Indian, then jurisdiction lies with the tribal or federal courts. *See Valdez,* 2003 UT App 60 at ¶4. Because we hold that the victim in this case is the Ute Indian Tribe, we need not address whether Defendants are Indians. *See id.*

¶8 "The current Uintah and Ouray Reservation is formed from portions of two prior reservations, the Uintah Valley Reservation, which was originally inhabited by the Uintah and Whiteriver Bands of Ute Indians, and the Uncompahgre Reservation, which was originally inhabited by the Uncompahgre Band." *United States v. Von Murdock,* 132 F.3d 534, 540 (10th Cir. 1997). "In 1937, . . . the three Bands joined together to form the Ute Indian Tribe of the Uintah and Ouray Reservation, and adopted a constitution and bylaws." *Id.* (footnote omitted). In 1950, representatives from each of the Bands "signed a series of five tribal resolutions which completed the transition, which began with the constitution, from loosely-knit Bands to [the] unified Ute Tribe." *Hackford v. Babbitt,* 14 F.3d 1457, 1461 (10th Cir. 1994). The constitution specified that the separate Bands ceased to exist outside the Ute Tribe, and the Ute Tribe maintained jurisdiction over the reservation

areas and the hunting and fishing rights.[2] *See Von Murdock,* 132 F.3d at 541.

¶9 The State asserts that it was the victim in this case, and because the State is not an Indian, state courts have jurisdiction over the offense. The State, however, is not the victim. The State concedes in its brief that the crime took place "in Uintah County on land that was within the original boundaries of the Uncompahgre Reservation and is 'Indian Country.'" There were disputes as to whether the 1894 and 1897 Acts of Congress disestablished the Uncompahgre Reservation. *See Ute Indian Tribe v. Utah,* 773 F.2d 1087, 1090-93 (10th Cir. 1985) (*Ute Indian Tribe III*). In *Ute Indian Tribe III,* however, the court held that the acts did not "disturb the ownership of the land by the tribal group." *Id.* at 1092. The original Uncompahgre Reservation is therefore considered Indian Country, which falls under the Ute Tribe's civil and criminal jurisdiction. *See Ute Indian Tribe V,* 114 F.3d at 1530 (confirming *Ute Indian Tribe III* that the tribe and federal government retained jurisdiction over the Uncompahgre Reservation). Thus, Defendants shot the deer in Indian Country governed by the Ute Tribe.

¶10 Alternatively, the State asserts that the crime is victimless. A victimless crime is a "[t]erm applied to a

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[2] The original reservation "was created by executive order and approved by an act of Congress." *Timpanogos Tribe v. Conway,* 286 F.3d 1195, 1202 (10th Cir. 2002) (footnote omitted). The act set apart the Uintah Valley for "the permanent settlement and exclusive occupancy of Utah Indian tribes [and] recognized and guaranteed the Indian rights of the tribes who settled there." *Id.* Those rights include the right to hunt. *See id.* ("'As a general rule, Indians enjoy exclusive treaty rights to hunt and fish on lands reserved to them. . . .'" (citation omitted)).

crime which generally involves only the criminal, and which has no direct victim, as in the crime of illegal possession of drugs." Black's Law Dictionary 1085 (6th ed. 1991). For purposes of Indian law, it has been emphasized that victimless crimes must be "truly victimless." William C. Canby, Jr., *American Indian Law* 166 (3d ed. 1998). "Crimes against Indian property interests are not victimless even though no Indian person is directly assaulted; Indian interests are affected and that fact places the crime within the exclusive jurisdiction of the federal government." *Id.*

¶11 "The right to hunt and fish on reservation land is a long-established tribal right." *United States v. Felter,* 752 F.2d 1505, 1509 (10th Cir. 1985). Additionally, "'[a]side from the right to hunt or fish on tribal lands to the exclusion of others, the tribe possesses the discretion inherent in the police power to regulate and allocate the fish and game resources as it sees fit, within the constraints imposed by law.'" *Id.* at 1511 (quoting *United States v. Felter,* 546 F.Supp. 1002, 1023 (D. Utah 1982)). Thus, the Ute Tribe has a regulatory interest over hunting and fishing on the land it governs. Because Defendants' acts of hunting on Indian Country affected the Ute Tribe's regulatory interest, the tribe is the victim.[3]

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[3] An argument might also be made that the Ute Tribe had a property interest in the wildlife. In *United States v. Von Murdock*, 132 F.3d 534 (10th Cir. 1997), the court stated that "'[t]ribal rights in property are owned by the tribal entity, . . . including hunting and fishing rights.'" *Id.* at 538 (quoting *United States v. Felter*, 546 F.Supp. 1002, 1021 (D. Utah 1982)). In Utah Code section 9-9-211, our legislature recognized a property right, noting that when a person goes on an Indian reservation and participates in hunting without proper authority then all "game . . . in the defendant's possession shall be forfeited to

(Continued on following page)

¶12 In holding that the defendant in *Von Murdock* was not an Indian, the 10th Circuit court asserted jurisdiction and affirmed the conviction for violating 18 U.S.C. § 1165, which prohibits hunting on land belonging to an Indian tribe without permission. *See Von Murdock,* 132 F.3d 534 (10th Cir. 1997). Likewise, in *Felter,* the court found that because the defendant no longer maintained Indian status, the federal court could assert jurisdiction rather than the tribal court. *See Felter,* 752 F.2d 1505. The *Felter* court noted "that 18 U.S.C. § 1165 is not applicable to tribal members who hunted in violation of tribal regulation. Tribal jurisdiction over such minor offenses remains exclusive." *Id.* at 1512 n.11 (quoting *Felter,* 546 F.Supp. at 1026). It remains clear, however, that "Indian tribes lack jurisdiction to try and punish non-Indians for criminal offenses, and [thus,] 18 U.S.C. § 1165 was designed to fill the gap in enforcement powers as to non-Indians hunting or fishing on tribal or other Indians lands without tribal permission." *Id.* The *Felter* court thus reasoned that an Indian hunting on Indian lands is under tribal jurisdiction, but a non-Indian hunting on Indian lands is under federal jurisdiction. Nothing in *Von Murdock* or *Felter*

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the tribe." Utah Code Ann. § 9-9-211 (2003). Similarly, pursuant to its jurisdiction over the land, the Ute Tribe claims a property interest in the wildlife. Section 8-1-3(1) of the Ute Law and Order Code states:

> All wildlife now or hereafter within the Uintah and Ouray Reservation, not held by private ownership legally acquired, and which for purposes of this Code shall include all big game animals . . . are hereby declared to be the property of the Ute Indian Tribe.

Ute Law and Order Code § 8-1-3(1); *cf.* Utah Code Ann. § 23-13-3 (2003) ("All wildlife existing within this state, not held by ownership and legally acquired, is the property of the state.").

suggests that state courts can ever assert jurisdiction over hunting violations committed on Indian lands.

CONCLUSION

¶13 We conclude that the crimes occurred in Indian Country governed by the Ute Tribe. Because the Ute Tribe is the victim, the State does not have jurisdiction. We therefore vacate the convictions.

Russell W. Bench
Associate Presiding Judge

¶14 WE CONCUR:

James Z. Davis, Judge

Gregory K. Orme, Judge

IN THE UTAH COURT OF APPEALS

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State of Utah, in the interest of C.R., a person under eighteen years of age.	MEMORANDUM DECISION (Not for Official Publication)
C.R., Appellant, v. State of Utah, Appellee.	Case No. 20040281-CA FILED (November 10, 2005)

Eighth District Juvenile, Vernal Department, 170075
The Honorable Larry A. Steele

Attorneys: Michael L. Humiston, Heber City, for Appellant
Mark L. Shurtleff and Joanne C. Slotnik, Salt Lake City, for Appellee

Before Judges Bench, Davis, and Orme.

BENCH, Associate Presiding Judge:

Appellant C.R. appeals a juvenile court judgment of wanton destruction of protected wildlife, a third degree felony if committed by an adult, in violation of Utah Code Section 23-20-4. *See* Utah Code Ann. § 23-20-4 (Supp. 2005). Among other issues, C.R. asserts that the State did not have jurisdiction over this case because he was hunting in Indian Country. "Whether the juvenile court had jurisdiction is a question of law which we review under a

correction of error standard." *Department of Human Servs. v. B.R.*, 2002 UT App. 25, ¶ 6, 42 P.3d 390 (quotations and citations omitted).

The facts of this case are, in all relevant respects, identical to the facts in *State v. Reber*, 2005 UT App 485. In that case, this court held that the State lacked jurisdiction to prosecute a violation of section 23-20-4 when committed in "Indian Country." *See id.*

As in *Reber*, we vacate the judgment in this case for lack of jurisdiction.

/s/ Russell W. Bench
Russell W. Bench,
Associate Presiding Judge

/s/ James Z. Davis
James Z. Davis, Judge

/s/ Gregory K. Orme
Gregory K. Orme, Judge

[SEAL] **EIGHTH DISTRICT JUVENILE COURT**
UINTAH COUNTY, STATE OF UTAH

920 East Hwy 40	255 S. State St.	21554 W 9000 S
Vernal, UT	PO Box 1286	PO Box 990
84078	Roosevelt, UT	Duchesne, UT
(435) 789-9335	84066	84021
	(435) 722-0235	(435) 738-0105

STATE OF UTAH, in the interest of	**ORDER**
COLTON REBER	**Case Number:** 170075
DOB: 07/07/2007 [sic] [12/30/88]	
Person(s) under eighteen years of age	

This matter came before the Court for Trial on the above matter this 15th day of March, 2004. Present was the above minor, his father, mother, and counsel, Mr. Mike Hummiston [sic]; Mr. Ed Peterson, Deputy County Attorney and a number of witnesses and spectators.

Ed Johnson, Officer Terry Smith, and Johnny Reber were called as witnesses.

The minor renewed his objection to the jurisdiction of this Court. The issue of jurisdiction has been previously ruled upon.

The minor objected to the amended information. The information was amended to include that the animal was a trophy animal because the rack was over 24 inches. The Court invited the minor to demonstrate wherein he would be prejudiced by the amendment. He had notice of the statutory provision cited in the prior Information. The deer antlers were available for examination by the minor and counsel. Counsel had even stipulated to the width of the antlers being greater than 24 inches. The Court found

there was no prejudice in proceeding with the amended Information.

The Court offered to further consider any prejudice which the minor may identify during the trial and reconsider the motion or bifurcate the proceedings and give the minor additional time to prepare to present any additional evidence or matters. After the trial began, there was no discussion of further prejudice and no request to bifurcate or for additional time to present further evidence or matters.

Having heard such oral testimony as the parties chose to introduce; examined the exhibits; heard oral argument, the Court makes the following findings, based on the credible evidence and the reasonable inferences to be drawn therefrom. The Court makes each of these findings beyond a reasonable doubt:

On or about October 27, 2004, Ed Johnson, a biologist of 17 years for the State of Utah, Division of Wildlife Resources, was doing a chronic wasting disease study for deer at Duck Rock which is at the end of the pavement at the south end of Bonanza Highway within Uintah County. A green Chevrolet or GMC pickup with license # 473JFN stopped and the occupants spoke to him. In the back of the vehicle was a buck Mule deer which had large 3 point antlers. Mr. Johnson was familiar with Utah game licenses and tags. This deer did not have a tag or permit. Mr. Johnson asked the vehicle to follow him into the Vernal office of Wildlife Resource Services. He met up with Officer Terry Smith at the intersection of Highway 40 and the Bonanza Highway and continued along with Officer Smith following into the Vernal office. He never lost sight of the deer until Officer Smith took custody of the animal

in Vernal. Officer Smith is a Conservation Officer for the Division of Wildlife Resources and has been an officer for 16 years.

Officer Smith took custody of the deer, removed and put an evidence tag on the antlers, which antlers have been in his continuous custody or in evidence lockers under his control ever since October 27, 2002. The antlers were admitted into evidence as Exhibit 1. The parties stipulated a photograph shall be substituted for the antlers. The parties stipulated that the "antlers which were attached to the buck mule deer taken by Officer Terry Smith from the vehicle in which the Defendant was an occupant on the 27th day of October 2002 have an outside antler measurement of 24 and ¾ inches." Mule deer such as the one taken are protected wildlife. A deer, such as this one, having a rack over 24 inches wide is a trophy animal.

After arriving at the vernal office, Officer Smith spoke to all occupants of the green pickup, Colton Reber; his father, Rickie Reber; his uncle, Johnny Reber; and Johnny's grandson, Quintin Huber. Colton stated to Officer Smith that this was his first deer. Officer Smith did not include this admission in his report. Mr. Rickie Reber stated that his son, Colton, had shot the deer at about 5:00 PM that day. The father stated that the deer was killed just east of Bitter Creek and the King's Well Road. Mr. Reber stated to Officer Smith that he and his son had gone out hunting and his son, Colton, had killed his first deer. He was out there to assist Colton hunt and was in the process of transporting the deer back to his brother's house. They were in his brother's truck.

The conversation with Mr. Reber and son, Colton, took place approximately 8:00 PM in the evening on October 27, 2002. The condition of the deer was consistent with the time of the kill and was consistent with the manner in which Mr. Reber indicated the deer had been killed. Officer Smith is familiar with the boundaries of Uintah County within the State of Utah and the area just east of Bitter Creek on King's Well Road is within Uintah County. Officer Smith is familiar with the road all the way to Duck Rock (15-20 miles) all of which is within Uintah County.

The hunters were not "100% sure" if they were legal or not, but argued that they had a right to hunt there. They did not have a Utah permit. They did present a paper which said "Timpanogas Tribe Subsistence Hunt 2002". The hunters stated they were members of the Timpanogas Tribe.

The uncle, Johnny Reber, was present during the hunt, but did not have Colton and Rickie always in sight. He did not see Colton shoot the deer, but when he caught up with Colton and Rickie, they had the deer and there was blood on Colton and Rickie from cleaning and transporting the deer.

The State asked the Court to make findings required by *Utah vs. Payne*, 892 Pd 1032 (Utah 1995). The offense occurred within the exterior boundaries of the State of Utah. The offense occurred within Uintah County. The offense and required elements of the offense occurred outside the boundaries of the Ute Indian reservation and any other Indian reservation. As previously ruled, the minor would have 1/32 Indian blood, not a sufficient degree to make the minor an "Indian" for the purposes of jurisdiction. The area in question is not within an area

over which an Indian tribe or the Federal Government has exclusive jurisdiction. The area in question is an area over which the State of Utah has jurisdiction.

The evidence was, for the most part, un-rebutted. The testimony of Johnny was presented and was argued by minor's counsel to raise a question as to who killed the deer. The testimony that Johnny did not keep Colton in sight and never saw Colton kill the deer, does little to rebut other evidence that Colton did kill the deer. Johnny also testified that when he returned to the father and Colton, they had the deer and had blood on them. The Court credits the testimony of Ed Johnson and Officer Terry Smith. In evaluating their testimony, the Court found them to be candid, truthful and largely un-rebutted. Officer Smith didn't include Colton's admission in his report, but he did include the father's admission. It appears to have been generally accepted, who killed the deer, Colton, the primary question and discussion related to jurisdiction.

The above minor, Colton Reber, on or about the 27th Day of October, 2002, in Uintah County, State of Utah, did commit Wanton Destruction of Protected Wildlife, an act in violation of UCA §23-20-4 and Section 23-20-3(1), a third degree felony, by shooting, injuring, killing, taking, possessing and transporting protected wildlife. Colton possessed protected wildlife unaccompanied by a valid license, permit, tag, certificate of registration, bill of sale, or invoice. Colton did so with intention, knowing, or reckless conduct. It was Colton's conscious objective or desire to engage in the conduct and cause the result. It was his first deer. The protected wildlife, the deer, which was captured, injured or destroyed was a trophy animal.

The parties disagreed on the degree to which the minor must know of the wrongfulness of his conduct to form the requisite intent. Nothing in the definition of "willful" requires scienter. Willful, when applied to the intent with which an act is done or omitted, implies a willingness to commit the act. It does not require an intent to violate the law or to injure another or acquire any advantage. State v. Larsen, 865 P.2d 1355 (Utah 1993). When more is required, the legislature so states, for example:

> *UCA 23-20-27.* Alteration of license, permit, tag or certificate a misdemeanor. Any person who at any time alters or changes in any manner, *with intent to defraud*, any license, permit, tag or certificate of registration issued under the provisions of this code or action of the Wildlife Board is guilty of a misdemeanor.

IT IS THEREFORE ORDERED, that the minor did commit wanton destruction of protected and trophy wildlife in violation of UCA §23-20-4 and Section 23-20-3(1), a third degree felony. The disposition or sentencing will be stayed for a period of thirty (30) days within which time the minor may file a written notice of appeal. If appealed, the disposition will be stayed pending the outcome of the appeal. If the matter is not appealed, a dispositional hearing shall be set after thirty (30) days has elapsed. This matter was transferred to the Eighth District Juvenile Court for "adjudication and disposition". If and when appropriate, disposition will occur in the Eighth District rather than in the First District Juvenile Court.

Filed: March 19, 2004
By: Amorette Oldroyd
Copy mailed, First Class, postage prepaid:
To: Ed Peterson
Michael L. Humiston
Rickie Reber

By: Amorette Oldroyd
On: March 19, 2004

Dated: 3-18-04

BY THE COURT

/s/ L. Steele [SEAL]
JUDGE LARRY A. STEELE

IN THE EIGHTH JUDICIAL DISTRICT COURT IN AND FOR UINTAH COUNTY, STATE OF UTAH

STATE OF UTAH Plaintiff, vs. RICKIE L. REBER, Defendant.	**RULING AND ORDER** Case No.: 021800320 (Filed Jan. 21, 2004)

The Court has reviewed the Defendant's pleading entitled "Witness Re: Reliance Upon Written Court Opinion, U.C.A. §76-2-304, as well as the pleadings relating to the Plaintiff's objection to the proposed witnesses. The Defendant alleges that he was acting in reliance upon a written interpretation of the law as contained in the following Tenth Circuit Court of Appeals cases: *Ute Indian Tribe of Uintah and Ouray Reservation v. Utah*, 114 F. 3d 1513; and *Timpanogos tribe v. Conway*, 286 F.2d 1195. To support his defense of ignorance or mistake of law, Defendant proposes to call the Appellate Court Judges who wrote the opinion of the Court in the above cases (to explain the case); a professor of law (to explain principles of Indian law); the Uintah County Recorder (to verify the location of the offense); the Chief Executive Officers of the "Timpanogos Tribe" (to explain the rights which the "Timpanogos Tribe" seeks to exercise in *Timpanogos v. Conway*); a senior member of the Uintah Band (to explain the history and traditions of Indians of Utah Territory and the history of litigation involving Indians of Utah Territory); and an "Indian of Utah Territory" (to explain Indian culture and religion and the government of the Uintah Band); an enrolled member of the Uncompahgre Band and

former member of the Ute Tribe Business Committee (to explain the historical separate existence of Uintah Band, to explain the rights retained by the Uintah Band and explain all relevant written laws and resolutions); and, a retired law professor (to explain the archeological, ethnological, and linguistic evidence connecting the Uintah Bank with Shoshone Indians).

Our Rules of Evidence indicate that "All relevant evidence is admissible . . . " rule 402 U.R.E. "Relevant evidence" is defined as evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401 U.R.E. Our statutes also provides (1) "In a jury trial, questions of law are to be determined by the Court . . . (2) The jury – are bound to follow the law as stated by the Court" 77-17-10(c) U.C.A. Rule 19 of the Utah Rules of Criminal Procedure also mandates that the court instruct the jury in writing at the conclusion of the evidence.

The above witnesses are offered as witnesses concerning the Defendant's defense of Ignorance or mistake of law under U.C.A. 76-2-34(2)(b). That section states:

"(2) Ignorance or mistake concerning the existence or meaning of a penal law is no defense to a crime unless: . . .

(b) His ignorance or mistake resulted from the actions reasonable reliance upon:

(i) The official statement of the law contained in a written order or grant of permission by an administrative agency changed by law with responsibility for interpreting the law in question; or of the law contained in an opinion of a Court of record or made by a

public servant charged by law with responsibility for interpreting the law in question; or

(ii) A written interpretation of the law contained in an opinion of a Court of record or made by a public servant charged by law with responsibility for interpreting the law in question."

Defendant has now abandoned his original claim that the permit he showed the officers at the scene (which was issued by the "Timpanogos Tribe") was a valid license which allowed the permittee to hunt wildlife. He now claims that, although the permit was not valid, at the time, he reasonably believed that it was valid. Alternatively at various times, Defendant has indicated that he was entitled to hunt without a permit issued by the State either:

(1) Because he is a descendant of a terminated Ute and has inherited hunting privileges from his mother; or

(2) Because he was alive at the time that the Termination Proclamation was issued and was not listed on the proclamation; and therefor has maintained rights to hunt; or

(3) Because he is an aboriginal Indian of Utah Territory who retains aboriginal hunting rights.

In its prior order this Court has ruled that hunting and fishing rights can not be inherited; that the Defendant's Indian status was terminated when his mother was listed on the Termination Proclamation; and, because he is 93.75% non-Indian, he does not possess a significant quantum of Indian blood and is not entitled to Indian status under *U.S. v. Rogers*, 45 U.S. (4 How.) 567. It is therefore apparent to the Court that in order for the

Defendant to raise the defense of mistake of law based upon the 10th Circuit opinions, he must introduce evidence that:

(1) He actually read the opinions or was informed of the decisions in a manner which could support reasonable reliance (if indeed one can ever reasonably rely upon hearsay concerning the contents of an opinion); and

(2) The holding in at least one of the cases was either:

(A) The "Timpanogos Tribe has legal authority to issue permits to take wildlife; or

(B) Descendants of terminated Utes, inherit their terminated parents rights to hunt wildlife; or

(C) Children of terminated Utes who were alive at the date of the Termination Proclamation, who were not listed on the proclamation, maintain rights to hunt; or

(D) A person who is only 6.25% Indian has a significant quantum of Indian blood under *Rogers*; and,

(3) He relied upon the holding in acting or failing to act; and

(4) His reliance on the holding was reasonable.

The court has carefully read each of the cases relied upon by the Defendant. *Timpanogos Tribe v. Conway* decided two narrow procedural issues: (1) Whether the Federal District Court had jurisdiction to consider the "Timpanogos Tribe's" claims; and (2) Whether the State of Utah was entitled to a dismissal under 12(b)(6) (Federal rules of Civil Procedure) for failure to state a claim of action based upon immunity of the State under the Eleventh

Amendment. The Court held that the fact that the "Timpanogos Tribe" was not recognized as an Indian Tribe by the Federal Government did not deprive the District Court of jurisdiction; and that, because the Plaintiffs only requested prospective injunctive relief, the State was not entitled to a 12(b)(6) dismissal based upon immunity under the Eleventh Amendment.

Ute Indian Tribe v. State of Utah is an attempt by the Tenth Circuit Court of Appeals to resolve conflicts between its prior holding in *Ute Indian Tribe v. Utah*, 773 F.2d 1087 and the United States Supreme Court's decision in *Hagen v. Utah*, 510 U.S. 399. The case addresses the issues of the boundaries of the Uintah Valley Reservation in light of the foregoing decisions. No issue relative to this case was considered by the Court.

For the purpose of considering the issue of the Defendant's Indian status, the State has indicated that it will concede that the offense occurred within Indian Country. Even assuming that the offense occurred within Indian Country, the Court has previously ruled that the Defendant does not have Indian status and that the Court has jurisdiction. Therefore, in order to advance its defense the Defendant must point to language in one of the cases which would reasonably lead the Defendant to believe one of the alternatives listed in (2)(A) through (D) above.

Neither of the cases which the Defendant relies upon held that: "The Timpanogos Tribe" has legal authority to issue hunting permit; or, children of terminated Utes inherit hunting rights; or, children of terminated Utes who were alive at the date of the Termination Proclamation retain hunting rights; or, a person who is 6.25% Indian has a significant quantum of Indian blood under *U.S. v.*

Rogers. Therefore, the Defendant can not advance a defense of ignorance or mistake of law based upon either case. It would be unreasonable as a matter of law for the Defendant to read either or both of these cases and conclude that the "Timpanogos Tribe" had legal authority to issue a permit, or that he was entitled to hunt based upon any of the various theories which are based upon his claimed Indian Status, or that he had a right to hunt based upon a permit issued by the "Timpanogos Tribe".

In addition, it is apparent that the proposed testimony is not relevant to the defense of ignorance or mistake of law and that some of the testimony is improperly offered to instruct the jury as to the law. The defense of ignorance or mistake of law requires reasonable reliance upon a written decision of a Court of record. The reliance can be based only on the written opinion: "The language of Section 76-2-304 clearly and unambiguously requires a written interpretation, by either a Court of Record or a public servant, in order for mistake of law to be an available defense." (*State v. Norton*, 67 P.3d 1050 at 1053). The opinions which the Defendant relies upon were opinions of a panel of Judges. Each opinion is what it is; the opinion of the panel can not be added to or subtracted from through parol evidence from one of its members. The law expressly requires that the reliance must be based on the opinion itself not some subsequent explanation of the opinion from a panel member. Similarly, it would be inappropriate to allow a professor of law to testify as to general principles of law upon which Indians routinely rely. The defense is specifically tied to written opinions issued by a Court of record, not general principles of law. The Defendant seeks to present evidence regarding: the purpose of the Timpanogos Tribe in bringing the lawsuit and the rights they

seek to enforce; Indian history and tradition; Indian culture and religion; the separate existence of the Uintah Band and the rights of its members; the laws and resolutions of the Uintah Band; and the archeological, ethnological, and linguistic connection to the Shoshone Tribe; However, none of this testimony is relevant to the written opinion upon which Defendant relies. Neither is the testimony of Mr. Simmons concerning the location of the alleged crime.

Based upon the above, the Court finds that the proposed testimony is not relevant because it does not have any tendency to make it more probable or less probable that the Defendant relied upon either 10th Circuit case. The Court will also find as a matter of law that the Defendant could not reasonably rely upon either *Timpanogos Tribe v. Conway* or *Ute Indian Tribe v. Utah* to advance his defense of ignorance or mistake of law.

DATED this 20 day of January, 2004.

BY THE COURT:

/s/ A. Lynn Payne
A. LYNN PAYNE,
DISTRICT COURT JUDGE

IN THE EIGHTH JUDICIAL DISTRICT COURT
COUNTY OF UINTAH, STATE OF UTAH

STATE OF UTAH Plaintiff, vs. RICKIE L. REBER, Defendant.	**RULING** Case No. 021800320 FS (Filed Nov. 10, 2003)

This Court has received under certification from the trial court judge the Defendant's Motion to Disqualify.

After fully reviewing the file, and within the provisions of Rule 29(c)(2) U.R.Cr.P., the Court finds that based upon the allegations supported by affidavit for the Motion to Disqualify that bias and prejudice, if any, that is alleged was known by the affiants prior to the court's ruling on the question of jurisdiction. Since Rule 29(c) requires the motion to disqualify to be filed at least within 20 days of (a) the assignment of the action or hearing to the judge, (b) the appearance of the party or the party's attorney, or (c) the date on which the moving party learns or with exercise of reasonable diligence should have learned of the grounds upon which the motion is based are all adequately and woefully late. The parties in this case have adequately and knowledgeably presented the arguments for determining jurisdiction when the Defendant has claimed to be an Indian. Those matters have been adequately briefed, well argued, and the trial court's ruling seems to be well supported in the case law.

It would seem that the Defendant has waited to disqualify the judge until almost eleven months after this

case was filed when he obtained an unfavorably ruling. Therefore, the matter will be returned to the trial judge. The Motion to Disqualify is hereby denied.

DATED this 10th day of November, 2003.

BY THE COURT:

/s/ John R. Anderson
John R. Anderson
Eighth District Court Judge

IN THE UTAH COURT OF APPEALS

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State of Utah, in the interest of C.R., a person under eighteen years of age.	)	
C.R.,	)	
Appellant,	)	ORDER
v.	)	Case No. 20040281-CA
State of Utah,	)	(Filed Mar. 2, 2006)
Appellee.	)	

This matter is before the court upon Appellee's petition for rehearing, filed December 23, 2005.

Now, therefore, IT IS HEREBY ORDERED that the petition for rehearing is denied.

Dated this 2nd day of March, 2006.

FOR THE COURT:

/s/ Russell W. Bench
Russell W. Bench,
Presiding Judge

IN THE UTAH COURT OF APPEALS

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State of Utah, Plaintiff and Appellee, v. Rickie L. Reber, Steven Paul Thunehorst, and Tex William Atkins, Defendants and Appellants.	ORDER Case No. 20040371-CA (Filed Mar. 2, 2006)
Ute Indian Tribe, Amicus Curiae.	

This matter is before the court upon Appellee's petition for rehearing, filed December 23, 2005.

Now, therefore, IT IS HEREBY ORDERED that the petition for rehearing is denied.

Dated this 2nd day of March, 2006.

FOR THE COURT:

/s/ Russell W. Bench
Russell W. Bench,
Presiding Judge

Ute Partition Act, Act of August 27, 1954, ch. 1009, 68 Stat. 868.

25 U.S.C. §677. Purpose

The purpose of this Act is to provide for the partition and distribution of the assets of the Ute Indian Tribe of the Uintah and Ouray Reservation in Utah between the mixed-blood and full-blood members thereof; for the termination of Federal supervision over the trust, and restricted property, of the mixed-blood members of said tribe; and for a development program for the full-blood members thereof, to assist them in preparing for termination of Federal supervision over their property.

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25 U.S.C. §677d. Restriction of tribe to full-blood members after publication of final rolls; non-interest of mixed blood members; new membership

Effective on the date of publication of the final rolls as provided in section 8 hereof [25 U.S.C. §677g] the tribe shall thereafter consist exclusively of full-blood members. Mixed-blood members shall have no interest therein except as otherwise provided in this Act. New membership in the tribe shall thereafter be controlled and determined by the constitution and bylaws of the tribe and ordinances enacted thereunder.

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25 U.S.C. §677g. Membership rolls of full-blood and mixed-blood members; preparation and initial publication; appeal from inclusion or omission from rolls; finality of determination; final publication; inheritable interest; future membership

The tribe shall have a period of thirty days from the date of enactment of this Act in which to prepare and submit to the Secretary a proposed roll of the full-blood members of the tribe, and a proposed roll of the mixed-blood members of the tribe, living on the date of enactment of this Act. If the tribe fails to submit such proposed rolls within the time specified in this Act, the Secretary shall prepare such proposed rolls for the tribe. Said proposed rolls shall be published in the Federal Register, and in a newspaper of general circulation in each of the counties of Uintah and Duchesne in the State of Utah. Any person claiming membership rights in the tribe, or an interest in its assets, or a representative of the Secretary on behalf of any such person, within sixty days from the date of publication in the Federal Register, or in either of the papers of general circulation, as hereinbefore provided, which publication date is last, may file an appeal with the Secretary contesting the inclusion or omission of the name of any person on or from either of such proposed rolls. The Secretary shall review such appeals and his decision thereon shall be final and conclusive. After disposition of all such appeals to the Secretary, and after all transfers have been made pursuant to section 4 hereof [25 U.S.C. §677c] the roll of the full-blood members of the tribe, and the roll of the mixed-blood members of the tribe, shall be published in the Federal Register, and such rolls shall be final for the purposes of this Act, but this Act shall not be construed as granting any inheritable interest in tribal assets to full-blood members of the tribe or as preventing future membership

in the tribe, after the date of enactment of this Act, in the manner provided in the constitution and bylaws of the tribe.

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25 U.S.C. §677r. Indian claims unaffected.

Nothing in this Act shall affect any claim heretofore filed against the United States by the tribe, or the individual bands comprising the tribe.

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25 U.S.C. §677v. Termination of Federal trust; publication; termination of Federal services; application of Federal and State laws

Upon removal of Federal restrictions on the property of each individual mixed-blood member of the tribe, the Secretary shall publish in the Federal Register a proclamation declaring that the Federal trust relationship to such individual is terminated. Thereafter, such individual shall not be entitled to any of the services performed for Indians because of his status as an Indian. All statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable to such member over which supervision has been terminated, and the laws of the several States shall apply to such member in the same manner as they apply to other citizens within their jurisdiction.

Preamble, Ute Constitution

We, the Ute Indians of the Uintah, Uncompahgre and Whiteriver Bands hereafter to be known as the Ute Indian Tribe of the Uintah and Ouray Reservation, in order to establish a more responsible tribal organization, promote the general welfare, encourage educational progress, conserve and develop our lands and resources, and secure to ourselves and our posterity the power to exercise certain rights of home rule, not inconsistent with the Federal, State and local laws, do ordain and establish this Constitution for the Ute Indian Tribe of the Uintah and Ouray Reservation.

Article III, §2

The Tribal Business Committee shall consist of six members, two (2) members duly elected from each of the three (3) bands of the Ute Indian Tribe of the Uintah and Ouray Reservation, known as the Uintah, Uncompahgre and Whiteriver Bands.

Article VI, §1, Ute Constitution

The Tribal Business Committee of the Uintah and Ouray Reservation shall exercise the following powers, subject to any limitation imposed by the statutes or the Constitution of the United States.

Article VI, §4, Ute Constitution

Any rights and powers heretofore vested in the Tribe or bands of the Uintah and Ouray Reservation but not expressly referred to in this Constitution shall not be abridged by this article, but may be exercised by the

people of the Uintah and Ouray Reservation through the adoption of appropriate By-laws and constitutional amendments.

Section 76-2-304(2), Utah Code Annotated (1953, as amended)

Ignorance or mistake concerning the existence or meaning of a penal law is no defense to a crime unless

(a) Due to his ignorance or mistake, the actor reasonably believed his conduct did not constitute an offense, and

(b) His ignorance or mistake resulted from the actor's reasonable reliance upon:

(i) An official statement of the law contained in a written order or grant of permission by an administrative agency charged by law with responsibility for interpreting the law in question; or

(ii) A written interpretation of the law contained in an opinion of a court of record or made by a public servant charged by law with responsibility for interpreting the law in question.

114 F.3d 1513 (10th Cir. 1997)

UTE INDIAN TRIBE OF THE UINTAH AND OURAY RESERVATION, Plaintiff-Appellee,

v.

STATE OF UTAH; Duchesne County, a political subdivision of the State of Utah; Roosevelt City, a municipal corporation; Duchesne City, a municipal corporation; Uintah County, a political subdivision of the State of Utah, Defendants-Appellants,

and

United States of America, Amicus Curiae.

No. 96-4073.

United States Court of Appeals,
Tenth Circuit.

May 8, 1997.

[1515] John W. Andrews, Assistant Attorney General (Jan Graham, Attorney General, Carol Clawson, Solicitor General, Reed Richards, Chief Deputy Attorney General, and Michael M. Quealy, Assistant Attorney General, with him on the brief), Office of the Attorney General for the State of Utah, Salt Lake City, UT, for Defendant-Appellant State of Utah.

JoAnn B. Stringham, Uintah County Attorney, Vernal, UT, on the briefs, for Defendant-Appellant Uintah County.

Herbert W. Gillespie, Duchesne County Attorney, Roosevelt, UT, on the briefs, for Defendant-Appellant Duchesne County.

Robert S. Thompson, III, General Counsel, Ute Indian Tribe, Fort Duchesne, UT (Sandra Hansen, Deputy General Counsel, Ute Indian Tribe, Fort Duchesne, UT, and

Tod J. Smith, Whiteing & Smith, Boulder, CO, with him on the brief), for Plaintiff-Appellee.

Robert L. Klarquist, U.S. Attorney (Lois J. Schiffer, Assistant Attorney General, Edward J. Shawaker, U.S. Attorney, and Curtis G. Berkey, U.S. Attorney, with him on the brief), Department of Justice, Washington, DC, appearing for amicus curiae United States of America.

Before TACHA, GODBOLD,* and HOLLOWAY, Circuit Judges.

TACHA, Circuit Judge.

* * *

[1528] **III. Jurisdictional Boundaries After *Hagen***

In determining the parties' respective jurisdictional boundaries after *Hagen* [*Hagen v. Utah*, 510 U.S. 399, 114 S.Ct. 958, 127 L.Ed.2d 252 (1994)], we begin by identifying the areas where *Ute Indian Tribe III* [*Ute Indian Tribe v. Utah*, 773 F.2d 1087 (10th Cir. 1985) (en banc)] and *Hagen* are not in conflict and can be reconciled. To the extent that the boundary determinations made in *Ute Indian Tribe III* do not directly conflict with *Hagen,* they remain in effect.

In *Ute Indian Tribe IV* [*Ute Indian Tribe v. Utah*, 935 F.Supp. 1473 (D.Utah 1996)], the 1996 district court opinion, the court fully addressed the areas of genuine conflict between *Ute Indian Tribe III* and *Hagen.* In large part, we need look no further than the district court's detailed opinion to determine those portions of the original Uintah Valley Reservation that remain the exclusive

* The Honorable John C. Godbold, Senior Circuit Judge, United States Court of Appeals for the Eleventh Circuit, sitting by designation.

province of the Tribe and the federal government. *See Ute Indian Tribe IV,* 935 F.Supp. at 1485-1505. In sum, we agree with the district court that *Hagen* did not effectively overrule the entire judgment in *Ute Indian Tribe III,* including our holdings concerning the National Forest Lands and the Uncompahgre Reservation. Further, we agree that *Hagen*'s only effect was to reduce (and not terminate) the boundaries of the Uintah Valley Reservation to the extent that lands within the Reservation were unallotted, opened for settlement under the 1902-1905 legislation, and not thereafter returned to tribal ownership. Accordingly, we hold that our prior judgment in *Ute Indian Tribe III* should be, and is now, modified to the extent that lands within the original reservation boundaries were unallotted, opened to non-Indian settlement under the 1902-1905 legislation, and not thereafter returned to tribal ownership. [5]

A. The Uintah Valley Reservation, The Uncompahgre Reservation, and the National Forest Lands

In *Ute Indian Tribe III,* we decided three reservation diminishment issues. First, we concluded that the 1902-1905 allotment legislation did not have the effect of diminishing or disestablishing the Uintah Valley Reservation. *Ute Indian Tribe III,* 773 F.2d at 1089. Second, we concluded that the withdrawal of the National Forest Lands did not diminish the Uintah Valley Reservation. *Id.*

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[5] Because we depart from a mandate of the en banc court and modify the earlier judgment in this case, we have circulated this opinion to the en banc court pursuant to our rules. Each member of the en banc court has concurred in our holding.

at 1090. Finally, we held that the 1894 and 1897 allotment legislation did not diminish or disestablish the Uncompahgre Reservation. *Id.* at 1093.

Hagen dealt only with the first of these three issues. As the district court stated:

> *Hagen* determined "that the Uintah Indian Reservation has been diminished by Congress," *i.e.*, that the original boundary of the Uintah Valley Reservation does not currently define the present territorial extent of federal, state and tribal jurisdiction in the Uintah Basin.

Ute Indian Tribe IV, 935 F.Supp. at 1484 (citing *Hagen,* 510 U.S. at 419-21, 114 S.Ct. at 969-70). The district court continued:

> *Hagen* [did not] address the Tenth Circuit's determination in [*Ute Indian Tribe III*] that the 1905 national forest withdrawals of approximately 1,010,000 acres of reservation land did not diminish the Uintah Reservation boundaries. *Hagen* also makes no ruling concerning the boundaries of the Uncompahgre Reservation, the original extent of which was reaffirmed by the Tenth Circuit.

Id. at 1485.

Although the state and local defendants admit that *Hagen* did not address the status of the Uncompahgre Reservation or the National Forest Lands, they assert that we should nevertheless recall our entire mandate in *Ute Indian Tribe III.* The defendants argue that *Hagen* effectively overruled the fundamental premise upon which the entire holding of *Ute Indian Tribe III* was based – namely, that statutory restoration language is insufficient to infer

diminishment. They point out that in *Hagen* the Supreme Court stated that "restoration of unallotted reservation lands to the public domain evidences a congressional intent with respect to those lands inconsistent with the continuation of reservation status." 510 U.S. [1529] at 414, 114 S.Ct. at 967. The state and local defendants argue that in light of this statement, *Ute Indian Tribe III*'s holding concerning the National Forest Lands and the Uncompahgre Reservation cannot stand because the entire holding was based on a misreading of the same congressional restoration language that was at issue in *Hagen*.

Assuming that *Ute Indian Tribe III*'s holding with respect to the National Forest Lands and the Uncompahgre Reservation was based on a misreading of the applicable legislation, such a misreading alone is not sufficient to justify departing from our earlier judgment. As we stated earlier, our decision to modify *Ute Indian Tribe III* does not result from the desire to correct a prior erroneous judgment, but rather from the need to reconcile our decision with a directly conflicting decision of the Supreme Court. Because *Hagen* did not directly address our holding in *Ute Indian Tribe III* as it relates to the National Forest Lands and the Uncompahgre Reservation, we have no reason to depart from that part of our prior judgment. We thus reject the defendants' contention that the judgment in *Ute Indian Tribe III* should be recalled in its entirety.

B. Non-Trust Lands Within the Original Boundaries of the Uintah Valley Reservation

Because we have concluded that *Hagen* did not address the status of the National Forest Lands or the Uncompahgre Reservation, we must now address the

extent to which *Hagen* directly conflicts with *Ute Indian Tribe III*. In particular, we must decide which lands within the Uintah Valley Reservation are no longer Indian country after *Hagen*. The remaining controversy centers on whether the state and local defendants or the Tribe and the federal government have jurisdiction over the various categories of non-trust (*i.e.,* fee), lands within the original boundaries of the Uintah Valley Reservation, whether held by Indians or non-Indians.

Under 18 U.S.C. § 1151, the Tribe and the federal government have civil and criminal jurisdiction over "Indian country." *Pittsburg & Midway Coal Mining Co. v. Watchman,* 52 F.3d 1531, 1540-41 (10th Cir.1995). Indian country includes "all Indian allotments, the Indian titles to which have not been extinguished." 18 U.S.C. § 1151(c). This category constitutes lands held in trust by the federal government. Indian country also encompasses "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation." 18 U.S.C. § 1151(a). Thus, Indian Country also includes all non-trust, or fee, lands so long as such lands are located within the "limits of any Indian reservation."

There are four categories of non-trust lands at issue in this case:

> (a) lands that passed from trust to fee status pursuant to non-Indian settlement under the 1902-1905 allotment legislation;
>
> (b) lands apportioned to the "Mixed Blood" Utes under the Ute Partition Act, Act of Aug. 27, 1954,

Pub.L. No. 97-698, ch. 1009, 68 Stat. 868 (codified at 25 U.S.C. §§ 677-677aa);

(c) lands allotted to individual Indians that have passed into fee status after 1905; and

(d) lands that were held in trust after the Reservation was opened in 1905 but that since have been exchanged into fee status by the Tribe for then-fee (now trust) lands in an effort to consolidate its land holdings pursuant to the Indian Reorganization Act, Act of June 18, 1934, ch. 576, 48 Stat. 984 (codified at 25 U.S.C. §§ 461-79) and the Indian Land Consolidation Act of 1983, Pub.L. No. 97-459, 96 Stat. 2517 (codified at 25 U.S.C. §§ 2201-11).

See Ute Indian Tribe IV, 935 F.Supp. at 1484, 1486. In *Ute Indian Tribe III,* we held that the 1902-1905 allotment legislation did not have the effect of diminishing or disestablishing the Uintah Valley Reservation. We thus concluded that all of the non-trust lands identified above remained "Indian country" under § 1151(a) as lands within "the limits of any Indian reservation." In this case, we must determine the extent to which *Hagen* directly conflicts with our earlier conclusion that all of the above categories of non-trust lands remain within Indian country.

[1530] The parties do not dispute that *Hagen* directly conflicts with the first category of non-trust lands, those lands passing in fee to non-Indians pursuant to the 1902-1905 allotment legislation. This was precisely the category of fee lands at issue in *Hagen.* Accordingly, we modify our mandate in *Ute Indian Tribe III* and hold in accordance with *Hagen* that these lands are no longer within Indian

country under section 1151(a) subject to the jurisdiction of the Tribe and the federal government.

With respect to the other three categories of non-trust lands, the state and local defendants argue that these lands also are no longer within Indian country after *Hagen*. They contend that the Supreme Court in *Hagen* "clearly contemplated that the exterior boundaries of the Reservation would simply be gone." Appt. Brief, at 44. In other words, the defendants argue that the Court held that the 1902-1905 legislation completely terminated the Reservation such that no discrete, definable reservation boundaries now exist. Under the defendants' theory, there are no external boundaries and thus no "limits of any reservation." Indian country therefore is confined under § 1151(c) to "Indian allotments . . . which have not been extinguished," or trust lands. Under the theory that Indian country is limited to trust lands, the defendants argue that the three disputed categories of non-trust lands no longer constitute Indian country.

We reject the defendants' argument that *Hagen* removed all non-trust lands within the original Uintah Valley Reservation from Indian country. In *Hagen*, the Supreme Court did not decide that the 1902-1905 allotment legislation completely disestablished the Uintah Valley Reservation, erasing its outer boundaries and rendering § 1151(a) inapplicable to the three disputed categories of non-trust lands. The Court in *Hagen* stated:

> [W]e hold that the restoration of *unallotted reservation lands* to the public domain evidences a congressional intent *with respect to those lands* inconsistent with the continuation of reservation status. Thus, the existence of such language in

> the operative section of a surplus land Act indicates that the Act *diminished* the reservation.

Hagen, 510 U.S. at 414, 114 S.Ct. at 967 (emphasis added). The Court stated that the Uintah Valley Reservation had been "diminished" – not "disestablished," "eliminated," or "terminated." Moreover, the diminishment was only "with respect to those lands" that had been restored to the public domain under the 1902-1905 legislation. *See Ute Indian Tribe IV,* 935 F.Supp. at 1487-88. We therefore conclude that *Hagen* did not erase the boundaries of the Uintah Valley Reservation and that the current "limits of [the] reservation" thus embrace the three categories of non-trust lands at issue. In sum, *Hagen* does not conflict with our holding in *Ute Indian Tribe III* that these categories of non-trust lands remain within Indian country under section 1151(a).

We note that this conclusion has the benefit of producing a stable, unchanging allocation of jurisdiction. Under our approach, the Tribe and the federal government retain jurisdiction over all trust lands, the National Forest Lands, the Uncompahgre Reservation, and the three categories of non-trust lands that remain within the boundaries of the Uintah Valley Reservation. The state and local defendants have jurisdiction over the fee lands removed from the Reservation under the 1902-1905 allotment legislation. Although a title search may be necessary to determine which lands were opened under the 1902-1905 legislation, the parties' respective jurisdictions will never change once the status of those lands is conclusively determined. By contrast, under the defendants' theory (*i.e.,* that Indian country is limited to trust lands) the Indian country status of land would change as trust lands are transferred into fee lands. We recognize

that while our approach might result in a checkerboard allocation of jurisdiction, such a result is more desirable than the defendants' approach, which would produce a "moving checkerboard" because lands leaving trust status would also lose their status as Indian country.

In conclusion, we reject the argument that Indian country is confined to lands held in trust by the federal government under § 1151(c). Rather, Indian country extends to all trust lands, the National Forest Lands, [1531] the Uncompahgre Reservation, and the three disputed categories of non-trust lands discussed above.[6]

CONCLUSION

For the foregoing reasons, we DENY the defendants' motion to recall our mandate in *Ute Indian Tribe III,* 773 F.2d 1087 (10th Cir.1985) (en banc), *cert. denied,* 479 U.S. 994, 107 S.Ct. 596, 93 L.Ed.2d 596 (1986). Rather, we MODIFY our mandate in *Ute Indian Tribe III* as set out above and REMAND with instruction that the district court consider the Tribe's request for permanent injunctive relief in light of this opinion.

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[6] We decline to address whether any portion of the non-trust lands opened in 1905 might still constitute Indian country under section 1151(b) as a "dependent Indian community" because that question is not properly before the court. The district court may be asked to consider the question upon remand.

286 F.3d 1195 (10th Cir. 2002)

TIMPANOGOS TRIBE, Snake Band of Shoshone Indians of Utah Territory, Plaintiff-Appellee,

v.

Kevin CONWAY, Assistant Director, Utah Department of Natural Resources, Division of Wildlife Resources; Michael O. Leavitt, Governor of the State of Utah, Defendants-Appellants.

Ute Indian Tribe of the Uintah and Ouray Reservation, Utah, Amicus Curiae.

No. 01-4056.

United States Court of Appeals, Tenth Circuit.

April 15, 2002.

[1198] Philip C. Pugsley, Assistant Attorney General (Mark L. Shurtleff, Attorney General, with him on the briefs), State of Utah, Salt Lake City, UT, for Defendants-Appellants.

Michael L. Humiston of Heber City, UT, for Plaintiff-Appellee.

Sandra Hansen, Office of Legal Counsel, Ute Indian Tribe, Fort Duchesne, Utah; and Tod J. Smith of Whiteing & Smith, Boulder, CO, filed a brief for Amicus Curiae.

Before SEYMOUR and HENRY, Circuit Judges, and OBERDORFER,* District Judge.

SEYMOUR, Circuit Judge.

The Timpanogos Tribe, Snake Band of Shoshone Indians of Utah Territory and aboriginal inhabitants of the region, filed suit against Kevin Conway, Assistant Director of the Utah Department of Natural Resources, and Governor Michael Leavitt of Utah. The district court denied defendants' motion to dismiss on the basis of, *inter alia,* Eleventh Amendment immunity. Defendants filed an interlocutory ap-[1199]peal of the Eleventh Amendment immunity issue and ask us to assert pendant appellate jurisdiction over the other issues argued in support of their motion to dismiss. We reach only the issues of Eleventh Amendment immunity and subject matter jurisdiction, and we affirm.

I.

The Tribe's complaint originally sought to quiet title on the Uintah Valley Reservation and obtain the following: a declaration that the Timpanogos Tribe, and not the Ute Tribe, are the "Indians of Utah" contemplated in the Executive Order, *see* Exec. Order, 1 Kappler 900 (Oct. 3, 1861), and Congressional Act, *see* Act of May 5, 1864, ch. 77, 13 Stat. 63, creating the Reservation; recognition of their rights under the Order and Act, specifically rights to hunt, fish, and gather; and a declaration that Messrs. Conway and Leavitt have no authority to regulate or

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* Louis F. Oberdorfer, United States District Judge for the District of the District of Columbia, sitting by designation.

control the hunting, fishing, or gathering rights of the Timpanogos Tribe on Indian lands within the Reservation, except as such authority is explicitly granted to the State of Utah by Act of Congress or consented to by the Tribe. Defendants filed a motion to dismiss under FED.R.CIV.P. 12(b)(6) raising five issues: (1) Eleventh Amendment immunity; (2) res judicata; (3) lack of subject matter jurisdiction under 28 U.S.C. § 1331; (4) failure to join indispensable parties; and (5) laches.

Over the course of a hearing on the motion and at the suggestion of the district court, the Tribe narrowed its complaint to come within the *Ex parte Young* exception to Eleventh Amendment sovereign immunity. *See Ex parte Young,* 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). By the end of the hearing, the Tribe had agreed to amend its complaint to seek nothing more than prospective, non-monetary, injunctive relief as to its hunting, fishing, and gathering rights within the Indian-controlled lands of the Uintah Valley Reservation.[1] The district court denied the motion to dismiss on all grounds.

* * *

[1201[**III.**

Defendants assert the district court lacks subject matter jurisdiction because plaintiffs have failed to state a claim that raises a cognizable federal question. The crux of defendants' contention, described in more detail below, is

[1] The district court made clear in the hearing on the motion to dismiss that the Tribe's claims as to rights within the boundaries of the Uintah Valley Reservation do not relate to lands within the reservation that have been explicitly withdrawn.

that the Tribe has no federal right on which to base a claim because it is not a "federally recognized" tribe.

[1202] In assessing whether the Tribe has stated a federal question in asserting its right to hunt on the Reservation, we look to the roots of the relationship between Indian tribes and the United States government. By the time of the Revolutionary War, "[i]t was accepted that Indian nations held 'aboriginal title' to lands they had inhabited from time immemorial." *County of Oneida v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 233-34, 105 S.Ct. 1245, 84 L.Ed.2d 169 (1985) (*Oneida II*).

> It very early became accepted doctrine in this Court that although fee title to the lands occupied by Indians when the colonists arrived became vested in the sovereign-first the discovering European nation and later the original States and the United States – a right of occupancy in the Indian tribes was nevertheless recognized. That right, sometimes called Indian title and good against all but the sovereign, could be terminated only by sovereign act. Once the United States was organized and the Constitution adopted, these tribal rights to Indian lands became the exclusive province of the federal law. Indian title, recognized to be only a right of occupancy, was extinguishable only by the United States.

Oneida Indian Nation of N.Y. v. County of Oneida, 414 U.S. 661, 667, 94 S.Ct. 772, 39 L.Ed.2d 73 (1974) (*Oneida I*).

The federal government has formally recognized the rights of Indians to specified areas of land through treaties

with tribes and by statute and executive order. *See generally* FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW, at 473-81 (1982 ed.).

> Beyond general principles of liberal interpretation of treaties in favor of tribes, there are certain rules with respect to the interpretation of treaty provisions establishing tribal land ownership. So long as a treaty purports to recognize Indian title or permanent rights to particularly described land it creates a recognized Indian title. Accordingly, phrases in treaty grants such as "use and occupancy" or "as Indian lands are held" do not refer to original Indian title but are held to vest recognized and enforceable property rights in the tribes."

Id. at 476.

The reservation at issue here was created by executive order and approved by an act of Congress.[3] The Act authorized and required the collection and settlement of the Indians of the Utah territory in the Uintah Valley, which was "set apart for the permanent settlement and exclusive occupation of such of the different tribes of Indians of said territory as may be induced to inhabit the same." *Id.* Under the accepted construction principles applicable to the creation of Indian reservations quoted above, the language of the Act setting apart the Uintah Valley for the permanent settlement and exclusive occupancy of Utah Indian tribes recognized and guaranteed the Indian rights

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[3] Indian reservations created by statute, agreement, or executive order generally have the same legal ramifications as those created by treaty. *See United States v. Dion*, 476 U.S. 734, 745 n. 8, 106 S.Ct. 2216, 90 L.Ed.2d 767 (1986); FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW, at 127-28 (1982 ed.).

of the tribes who settled there. Those rights include the hunting rights at issue in this case. "As a general rule, Indians enjoy exclusive treaty rights to hunt and fish on lands reserved to them, unless such rights were clearly relinquished by treaty or have been modified by Congress. These rights need not be expressly mentioned in the treaty." *United States v. Dion,* 476 U.S. 734, 738, 106 S.Ct. 2216, 90 L.Ed.2d 767 (1986) (internal citation omitted).

[1203] "It is rudimentary that 'Indian title is a matter of federal law and can be extinguished only with federal consent' and that the termination of the protection that federal law, treaties, and statutes extend to Indian occupancy is 'exclusively the province of federal law.'" *Wilson v. Omaha Indian Tribe,* 442 U.S. 653, 670-71, 99 S.Ct. 2529, 61 L.Ed.2d 153 (1979) (quoting *Oneida I,* 414 U.S. at 670, 94 S.Ct. 772). Although the Tribe here asserts Indian title under a federal statute, defendants nevertheless argue that the Tribe's claim does not arise under federal law for purposes of subject matter jurisdiction pursuant to section 1331. Defendants contend the Tribe is barred from proceeding under section 1331 because the Tribe is not administratively recognized by the Bureau of Indian Affairs of the Department of Interior pursuant to 25 C.F.R. Pt. 83, because the Tribe was not included as one for whose benefit the Reservation was created, and because the Act creating the Reservation was not intended to create an implied cause of action. The main thrust of all defendants' arguments is an assertion that the Tribe's lack of federally recognized status is fatal to its ability to proceed under section 1331. We disagree.

In 1978, the Department of the Interior promulgated regulations establishing the procedures by which it would acknowledge "that certain American Indian groups exist

as tribes." 25 C.F.R. § 83.2.[4] Administrative recognition of an Indian tribe is now a prerequisite to that tribe's ability to obtain "the protection, services, and benefits of the Federal government available to Indian tribes by virtue of their status as tribes." *Id.* However, the federal government had previously recognized groups of Indians as tribes in a variety of ways for a variety of purposes. *See generally* COHEN, at 3-7. Even after the promulgation of Part 83, "tribes cannot be neatly divided into 'recognized' and 'nonrecognized' tribes for all purposes; rather, a tribe may 'exist' for some purposes but not for others." *Id.* at 7.

Moreover, "[t]he Department of the Interior cannot under any circumstances abrogate an Indian treaty directly or indirectly. Only Congress can abrogate a treaty, and only by making absolutely clear its intention to do so." *United States v. Washington,* 641 F.2d 1368, 1371 (9th Cir.1981); *see also Dion,* 476 U.S. at 738-40, 106 S.Ct. 2216; *Wilson,* 442 U.S. at 670-71, 99 S.Ct. 2529. Thus, the fact that a tribe is not administratively recognized does not affect that tribe's vested treaty rights. *See Greene v. Babbitt,* 64 F.3d 1266, 1270 (9th Cir.1995); *see also Menominee Tribe v. United States,* 391 U.S. 404, 88 S.Ct. 1705, 20 L.Ed.2d 697 (1968) (treaty hunting rights survived despite congressional termination of all formal tribal political authority). "[A] tribe's recognition or lack of recognition by the Secretary of the Interior does not determine whether the tribe has vested treaty rights."

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[4] These regulations cite as statutory authority for their promulgation 5 U.S.C. § 301; 25 U.S.C. §§ 2, 9; and 43 U.S.C. § 1457. *See* 25 C.F.R. Pt. 83. "The term tribe has no universal legal definition. There is no single federal statute defining an Indian tribe for all purposes, although the Constitution and many federal statutes make use of the term." COHEN, at 3.

Greene, 64 F.3d at 1270. "Nonrecognition of the tribe by the federal government and the failure of the Secretary of the Interior to approve a tribe's enrollment may result in loss of statutory benefits, but can have no impact on vested treaty rights." *Id.* (quoting *United States v. Washington,* 520 F.2d 676, 692-93 (9th Cir.1975)). Accordingly, the Tribe here may establish federal question jurisdiction in asserting its hunting rights despite the [1204] fact that it is not recognized by the Department of the Interior.

Defendants rely on *Western Shoshone Bus. Council v. Babbitt,* 1 F.3d 1052 (10th Cir.1993), in arguing that the Tribe's lack of recognized status bars its ability to assert its Indian rights under the Act creating the Uintah reservation. *Western Shoshone* is distinguishable, however, due to the nature of the federal statute involved in that case. The Tribe in *Western Shoshone* was seeking to assert rights under 25 U.S.C. § 81, which requires that contracts with tribes for the payment of money be approved by the Bureau of Indian Affairs. Section 81 created a federal benefit available to Indian tribes officially recognized for that purpose. Because the tribe in that case was not administratively recognized, we held it was not within the zone of interests protected by section 81 and therefore had no standing to bring suit. Here, however, the statute establishing the reservation did not create a federal benefit or provide a federal service; rather, it recognized and guaranteed preexisting rights. *Western Shoshone* addressed only the ability of an unrecognized tribe to obtain statutory benefits *created* by the federal government; it does not apply to preexisting Indian rights recognized and guaranteed by a treaty, statute, or executive order.

Defendants' remaining challenges to subject matter jurisdiction under section 1331 may be addressed summarily. Defendants contend the Tribe cannot claim rights under the Act establishing the Reservation because it is not a tribe for whose benefit the Reservation was created. It does not appear from the scant record before us on appeal that defendants presented this argument to the district court. In any event, as the district court observed, on a motion to dismiss under Rule 12(b)(6) the court "must accept as true all the factual allegations in the reasonable inferences in plaintiff's favor." *Seamons v. Snow,* 84 F.3d 1226, 1231-32 (10th Cir.1996). The allegations in the Tribe's complaint, taken as true, are clearly sufficient for purposes of a motion to dismiss to demonstrate that the Tribe is a group to whom the Act applies.

* * *

[1205] We conclude that the district court had subject matter jurisdiction over this action under section 1331. . . .

* * *

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS

INTER-OFFICE TRANSMITTAL

TO: Area Director,
Phoenix, Arizona

Bureau of Indian Affairs
Received
March 9, 1970
Phoenix

FOR ATTENTION OF Credit and Financing, Daphne Armstrong

FROM:

Uintah and Ouray Agency
Fort Duchesne, Utah 84026 Ten. and Mgmt. Real Prop. Mgmt. 03-05-70

SUBJECT:

The attached mimeographed final MB roll with band identification added was prepared by the Tribal office under direction of R. O. Curry, Administrative Officer. It is being mailed you in accordance with a telephone conversation with Mr. Thompson yesterday. The map is being prepared and will be mailed you under separate cover within the next day or two.

FINAL ROLL MIXED –BLOOD

Savings No.	Roll No.		Sex	Date of Birth	Remarks	BAND
	1	Allen, Preston	M	12-21-13		Uintah
	2	Allred, Frances	F	7-27-12		Uintah
	3	Antonio, Lorena Reed	F	11-10-25		Uintah
	4	Arkansas, Phillip	M	1903		Uintah

						BAND
153	5	Ballard, Delphina	F	2-3-40	MM	Uintah
155	6	Ballard, Lola Christine	F	11-1-41		Uintah
154	7	Ballard, Louis Jr.	M	10-22-42		Uintah
	8	Bailey, Lola C. Daniels	F	9-15-13		Uintah
2178	9	Bailey, John Franklin	M	10-2-38	MM	Uintah
	10	Bailey, Gary Thomas	M	12-5-34		Uintah
	11	Bailey, Richard Allen	M	5-20-33		Uintah
	12	Bitsilly, Laura LaRose	F	12-28-33		Uintah
2180	13	Bitsilly, Flora	F	5-10-53		Uintah
	14	Brown, Ruth Pigeon	F	5-17-20		Uintah
2181	15	Burns, Richard V. Jr.	M	9-23-38		Uintah
	16	Burns, Roberta Marie	F	12-13-40	MM	Uintah
	17	Burson, Dudley Weldon	M	11-15-18		Uintah
	18	Burson, Frank Kyle	M	11-27-22		Uintah
	19	Burson, Arlene Ella	F	3-20-40	MM	Uintah
279	20	Burson, Carnes Dudley	M	5-14-42		Uintah
278	21	Burson, Carma Bly	F	7-7-43		Uintah

					BAND
	22	Burson, Fred LaRose	M	4-11-35	Uintah
	23	Burson, Oliver	M	7-5-30	Uintah
	24	Burson, Leonard Richard	M	9-27-20	Uintah
	25	Burson, Weldon Nephi	M	1-14-24	Uintah
277	26	Burson, Alfred Leonard	M	9-27-52	Uintah
	27	Burson, Ella	F	8-26-17	Uintah
	28	Burson, Robert George	M	6-2-26	Uintah
	29	Burson, Woodsey Irene LaRose	F	1898	Uintah
	30	Bumgarner, Elizabeth Curry	F	1-29-13	Uintah
2469	31	Bumgarner, Samuel Reginald	M	2-28-38	Uintah
3636	32	Bumgarner, Oranna —	F	11-5-44	Uintah
3637	33	Bumgarner, Craig Walker	M	2-13-49	Uintah
638	34	Bumgarner, Elizabeth Warleen	F	8-14-52	Uintah
	35	Burdick, — Morris	M	8-31-27	Uintah
	36	———	—	———	———

						BAND
	37	Butcher, --ieda Pike	F	9-27-08		Uintah
	38	Cambell, Ella E. Pike	F	5-9-13		Uintah
	39	Case, Louise Allen	F	1-12-16		Uintah
	40	Chivers, Mary Christensen	F	4-7-34		Uintah
	41	Christensen, Clarence	M	11-24-24		Uintah
	42	Christensen, Esther Ray Clark	F	1-21-25		Uintah
	43	Christensen, Jewel	M	6-11-30		Uintah
	44	Christensen, Salma Hackford	F	8-27-16		Uintah
	45	Christensen, Jens Dale	M	9-29-35		Uintah
	46	Christensen, Dilbert Richard	M	3-26-28		Uintah
386	47	Christensen, LeRoy	M	1-24-37		Uintah
	48	Caudell, Floyd Eugene	M	11-6-38		Uintah
	49	Caudell, Joan Barbara	F	8-10-40	MM	Uintah
2186	50	Caudell, LaFern Cleo	F	10-9-42		Uintah
	51	Clark, Joan Sylvia Beacroft	F	5-9-35		Uintah

						BAND
	52	Condo, Iva Karie McAdams	F	11-29-24		Uintah
	53	Collier, Lenora Harmes	F	7-28-16		Uintah
	54	Cook, June McClure	F	6-17-29		Uintah
	55	Coop, Hazel E. Young	F	3-4-32	ESTATE	Uintah
	56	Copperfield, Dwight	M	12-25-17		Whiteriver
	57	Copperfield, Alice Oarum	F	10-3-24		Whiteriver
361	58	Chapoose, Thomas Carnes	M	9-12-42		Uintah
	59	Curry, Oran F.	M	5-2-91		Unc.
	60	Curry, Della Harris	F	10-6-90		Uintah
	61	Curry, Reginald O.	M	10-20-14		Unc.
	62	Curry, Dianne Elizabeth	F	1-11-44		Unc.
	63	Curry, Gwennita O.	F	3-16-36		Unc.
3639	64	Curry, James Earl	M	7-7-40		Unc.
3640	65	Curry, Rebecca Lynn	F	9-9-48		Unc.
	66	Curry, Richard Henry	M	1-18-27		Unc.

						BAND
2187	67	Curry, Richard H., Jr.	M	5-3-47		Unc.
2188	68	Curry, Ralph Edward	M	11-2-48		Unc.
2189	69	Curry, Regina Lorene	F	1-12-53		Unc.
	70	Crumbo, Daniel	M	1-9-20		Uintah
	71	Crumbo, Hal	M	9-23-24		Uintah
	72	Crumbo, Wentora Daniels	F	1894		Uintah
2190	73	Daniels, Allen George	M	4-21-33		Uintah
	74	———	—	———		———
	75	Daniels, Rose Mary	F	10-6-37	MM	Uintah
–3	76	Daniels, Bonnie Lee	F	11-5-38		Uintah
	77	Daniels, Charles Albert	M	6-16-36		Uintah
	78	Daniels, Everett	M	2-22-27		Uintah
–7	79	Daniels, Paula Evette	F	8-8-52		Uintah
	80	Daniels, Gene T.	M	12-9-29		Uintah
	81	Daniels, Hal Albert	M	12-9-86		Uintah
	82	Daniels, John	M	9-13-16		Uintah
	83	Daniels, Terry J.	M	3-3-37	MM	Uintah

						BAND
	84	Daniels, Lewis	M	8-10-32		Uintah
	85	Daniels, Walter	M	11-14-35		Uintah
–04	86	Daniels, Walter	M	7-18-88	ESTATE	Uintah
	87	Denver, Alvin Richardson	M	6-24-20		Uintah
–95	88	Denver, Alvin Richard	M	8-21-39	MM	Uintah
	89	Denver, Connie Mack Sr.	M	10-14-13		Uintah
–39	90	Denver, Reginald D.	M	12-29-43		Uintah
–96	91	Denver, Connie Mack Jr.	M	12-27-42		Uintah
–97	92	Denver, Marilyn Caye	F	5-29-46		Uintah
–98	93	Denver, Gwendolyn Rose	F	11-18-47		Uintah
–199	94	Denver, Elmer George	M	2-19-50		Uintah
–200	95	Denver, Ava Renae	F	5-15-51		Uintah
	96	Denver, Ellis	M	7-1-26		Uintah
–201	97	Denver, Mary Lucille	F	4-3-48		Uintah
	98	Denver, Elmer Jr.	M	4-30-16		Uintah

					BAND
	99	Denver, Charles Howard	M	5-13-37	Uintah
	100	Denver, Mildred Irene	F	4-26-36	Uintah
	101	Denver, Pauline	F	8-21-31	Uintah
	102	Denver, Milton	M	8-26-36	Uintah
	103	Devener, Naturitch Kolb	F	5-31-15	Uintah
	104	Disney, Illa Hendricks	F	3-25-37	Uintah
	105	Eker, Nettie Ray LaRose	F	11-7-22	Uintah
2202	106	Eddards, Gerald Twohy	M	5-21-39	Uintah
	107	Edmo, LaBarbara T. Hendricks	F	12-20-30	Uintah
	108	Felter, Dan Earl	M	10-30-35	Uintah
	109	Felter, James Keith	M	8-25-32	Uintah
	110	Felter, Jasper Lee	M	11-18-33	Uintah
	111	Ferguson, Anna Dot Workman	F	7-14-19	Uintah
	112	———	—	9-26-22	Uintah
	113	Frazier, Etta Daniels	F	7-19-19	Uintah

						BAND
	114	Galloway, Christine Pedro	F	3-21-1		Uintah
	115	Garcia, Pearl Taylor	F	1897		Uintah
	116	Gardner, Carma Colleen Reed	F	9-12-38	MM	Uintah
	117	Gardner, Earl	M	4-15-05		Uintah
	118	Gardner, Gary	M	3-20-35		Uintah
	119	Gardner, Elva Harris	F	3-12-29		Uintah
	120	Gardner, John Delmar	M	2-5-09		Uintah
	121	Gardner, Marion LaRae	F	7-6-37	MM	Uintah
	122	Gardner, Glenda Jane (Arrowchis)	F	6-6-35		Uintah
	123	Grayson, Emily Hendricks	F	2-5-33		Uintah
	124	Genereaux, Nathan Byrd	M	7-30-33		Uintah
661	125	Genereaux, Thelma Leta	F	3-19-52		Uintah
203	126	Green, Gary Edgar, Jr.	M	8-14-53		Whiteriver
	127	Hackford, Clifton J.	M	10-4-25		Uintah
723	128	Hackford, Elizabeth	F	2-4-46		Uintah

					BAND
722	129	Hackford, Clifton Kermit	M	2-1-47	Uintah
725	130	Hackford, Sandra LaVerne	F	1-12-50	Uintah
724	131	Hackford, Randolph C.	M	5-10-52	Uintah
	132	Hackford, David LaMarr	M	3-14-36	Uintah
	133	Hackford, Elmer LeRoy	M	3-3-22	Uintah
	134	Hackford, Wanda Russell	F	4-1-26	Uintah
	135	Hackford, Eloise Beatrice	F	7-3-33	Uintah
	136	Hackford, Eva F. Van	F	1901	Uintah
	137	Hackford, Lynn Henry	M	1-16-39	Uintah
	138	Hackford, Lewis James	M	6-18-31	Uintah
	139	Hackford, Melvin Lyle	M	11-3-29	Uintah
	140	Hackford, George Jr.	M	9-23-20	Uintah
	141	Hackford, Richard B.	M	12-9-23	Uintah
2205	142	Hackford, Richard Douglas	M	8-25-50	Uintah
2206	143	Hackford, Richita Marie	F	8-15-51	Uintah

						BAND
2207	144	Hackford, Rosana Faye	F	8-4-52		Uintah
	145	Hackford Sarah Van	F	10-9-96		Uintah
	146	Hackford, Calvin C.	M	9-12-37	MM	Uintah
	147	Hackford, Verna Marie	F	1-3-33		Uintah
	148	Hanson, Mary M. Reed	F	8-11-21		Uintah
2497	149	Hanson, Mark Reed	M	5-9-49		Uintah
	150	Harmes, John	M	1876		Uintah
	151	Harris, –use K.	M	2-17-94		Uintah
3641	152	Harris, Annie Pike	F	1892		Uintah
	153	Harris, Albert Harding	M	5-16-21		Uintah
2208	154	Harris, Lacee Allen	M	4-29-44		Uintah
2209	155	Harris, Linda Marie	F	1-26-48		Uintah
2210	156	Harris, John Carlyle	M	11-10-52		Uintah
2211	157	Harris, Suzanne	F	1-17-51		Uintah
	158	Harris, Clarence Sr.	M	1893		Uintah
	159	Harris, Gilbert Henry	M	11-17-35		Uintah
	160	Harris, Donald	M	12-12-33		Uintah
3642	161	Harris, Buddy	M	10-12-41		Uintah

						BAND
	162	Harris, Clarence Jr.	M	10-7-12		Uintah
2212	163	Harris, Annie Maxine	F	8-26-38	MM	Uintah
2213	164	Harris, Everett	M	3-11-39		Uintah
	165	Harris, Woodrow Daniel	M	5-16-35		Uintah
	166	Harris, Henry E. Jr.	M	1-31-96		Uintah
328	167	Harris, John E.	M	6-18-88		Uintah
	168	Harris, Mary Reed	F	11-7-69		Uintah
	169	Healey, Claudia Daniels	F	12-10-14		Uintah
	170	Healey, Ralph Jr.	M	3-20-37		Uintah
	171	Hendricks, Brett Clinton	M	8-29-26		Uintah
	172	Hendricks, Charley Jr.	M	8-28-24		Uintah
	173	Hendricks, Ezelda Van	F	1-13-21		Uintah
	174	Hendricks, Dee	M	2-2-21		Uintah
	175	Hendricks, Floyd E.	M	12-17-35		Uintah
	176	Hendricks, Helen Mack Murray	F	1-6-36		Uintah
	177	Hendricks, Elda Hackford	F	7-22-27		Uintah

						BAND
	178	Hendricks, Margaret Murray	F	1903		Uintah
	179	Hendricks, Reed	M	5-29-28		Uintah
3643	180	Hill, Nettie Harmes	F	1879		Uintah
	181	Hill, Robert L.	M	1902		Uintah
	182	Holmes, Eva L. Harris	F	9-26-13		Uintah
2220	183	Holmes, Mary Sue	F	8-14-39	MM	Uintah
2221	184	Holmes, Tonia	F	6-12-50		Uintah
	185	Holmes, Rose Crumbo	F	8-5-21		Uintah
2223	186	Holmes, Jacqueline Lee	F	6-3-41		Uintah
2224	187	Holmes, Michael E.	M	11-6-44		Uintah
	188	———	F	1-12-24		Uintah
	189	Iorg, Arlys	M	8-12-33		Uintah
	190	Iorg, Clora K. Hackford	F	1-15-35		Uintah
	191	Iorg, Lorena M. Denver	F	4-3-12		Uintah
	192	Iorg, Thilma Curry	F	2-5-09		Uintah
	193	Iorg, Verle Charles Jr.	M	4-12-38	MM	Uintah
356	194	Iorg, Danny Kaye	M	2-9-47		Uintah

					BAND
359	195	Iorg, Oran Henry	M	4-6-39	Uintah
	196	Jackman, Norma Harris	F	4-26-23	Uintah
	197	Jensen, Leona M. -. Christensen	F	11-18-32	Uintah
	198	Jorgenson, Rodney N.	M	3-26-23	Uintah
	199	Johnson, Oreane F. Curry	F	12-10-30	Uintah
-49	200	Johnson, Margaret Dellanna	F	3-23-51	Uintah
	201	Jones, Ray Pike	M	11-13-32	Uintah
	202	Jones, Simon Ray Pike	M	2-1-07	Uintah
	203	Johnson, Wilson	M	8-15-08	Uintah
	204	Kelley, Meryl E. Workman	F	6-9-19	Uintah
493	205	Kanapatch, Berhemia	F	1880	Unc.
	206	Knowles, Katherine Young	F	9-29-24	Uintah
	207	Kolb, Ethel Daniels	F	1891	Uintah
	208	Kolb, Donald Lloyd	M	4-23-11	Uintah

					BAND
	209	Kolb, Cosma Lee	F	1-31-40	Uintah
	210	Kolb, John Wayne	M	3-11-42	Uintah
	211	Kolb, Lawrence L.	M	5-6-36	Uintah
	212	Kolb, Jewel Dee	M	9-17-18	Uintah
342	213	Kolb, Jewel Daniel	M	6-27-41	Uintah
236	214	Kolb, Grace Ethel	F	7-5-43	Uintah
238	215	Kolb, Sandra Lee	F	10-23-50	Uintah
	216	Kolb, Quentin F.	M	8-17-24	Uintah
	217	Kolb, Taw–ee	M	2-5-17	Uintah
498	218	Kolb, D–ral Edward	M	5-22-39	Uintah
	219	Labeau, Ada D. Denver	F	2-24-34	Uintah
	220	Land, Edna W. Johnson	F	12-25-23	Uintah
334	221	Land, Danny	M	9-21-46	Uintah
333	222	Land, Donna Mae	F	4-26-44	Uintah
336	223	Land, Margaret Ann	F	12-14-48	Uintah
331	224	Land, Barbara Joan	F	1-4-51	Uintah
335	225	Land, Karen Marie	F	4-12-52	Uintah

					BAND
337	226	Land, Sharon Kay	F	4-26-54	Uintah
	227	LaRose, Betty Taylor	F	5-6-31	Uintah
2243	228	LaRose, Carl Alan	M	5-29-48	Uintah
2245	229	LaRose, Darrell Henry	M	9-23-50	Uintah
	230	LaRose, Carnes	M	11-12-92	Uintah
	231	LaRose, Kenneth Carnes	M	8-9-21	Uintah
	232	LaRose, Lois Mae Secakuku	F	2-22-28	Uintah
1050	233	LaRose, JoAnna	F	4-28-48	Uintah
1051	234	LaRose, K.C.	M	10-13-52	Uintah
	235	LaRose, Loren Fred	M	11-29-19	Uintah
1046	236	LaRose, Dorothy	F	11-14-45	Uintah
1042	237	LaRose, Christine	F	9-26-49	Uintah
1055	238	LaRose, Peggy Joyce	F	2-8-50	Uintah
1056	239	LaRose, Richard –.	M	4-19-47	Uintah
	240	LaRose, Norman	M	4-16-16	Uintah
	241	LaRose, Juanita Daniels	F	12-11-24	Uintah

					BAND
1041	242	LaRose, Aaron Roy	M	5-9-47	Uintah
1049	243	LaRose, Jackie	M	3-10-51	Uintah
1054	244	LaRose, Norman Dennis	M	6-20-48	Uintah
	245	LaRose, Thomas Sr.	M	1903	Uintah
	246	LaRose, Rosella Montes	F	5-19-10	Uintah
	247	LaRose, Blanche May	F	6-10-35	Uintah
	248	LaRose, Eugenia	F	10-22-36	Uintah
2257	249	LaRose, Eric Gene	M	10-2-42	Uintah
	250	Larson, Geneva Daniels	F	9-6-20	Uintah
	251	LeBaron, Calva Hack-ford	F	11-11-28	Uintah
2259	252	Lee, Charles –ayne	M	1-27-39	Uintah
1128	253	Lucero, Berbarita	F	10-7-43	Unc.
	254	Lucero, Bernard	M	7-4-33	Unc.
-323	255	Lucero, Eileen Marie	F	10-22-48	Unc.
	256	Lucero, Fred	M	4-27-29	Unc.

						BAND
-276	257	Lucero, Juanita	F	8-16-46		Unc.
	258	Lucero, Pete Robert	M	1-26-36		Unc.
	259	Lujan, Donnaciana	M	1871		Unc.
	260	Lopez, Lucille Hack-ford	F	5-9-24		Uintah
	261	Martin, Sandra allise	F	7-15-36		Uintah
	262	Martinez, Aileen Burson	F	7-21-28		Uintah
	263	Matheson, Leah Elinor	F	1-25-38	MM	Uintah
	264	McClure, Juanita Workman	F	5-8-14		Uintah
	265	McClure, Lynn Frank	M	4-24-33		Uintah
	266	McClure, Rex Charles	M	1-16-35		Uintah
	267	McMurdock, Glenn Jr.	M	6-24-25		Uintah
	268	McQuarrie, Ina P. Gardner	F	9-12-07		Uintah
	269	McQuarrie, Ina Marie	F	9-18-29		Uintah
	270	McQuarrie, Joyce	F	2-11-34		Uintah

						BAND
	271	Myers, Florence Denver	F	1-3-28		Uintah
	272	Mitchell, Theresa J. McClure	F	11-30-30		Uintah
	273	Mojado, Gwendolyn Murdock	F	12-25-26		Uintah
2266	274	Mojado, Alan Gil	M	7-2-50		Uintah
2265	275	Mojado, Colin Gary	M	7-4-52		Uintah
2264	276	Mojado, Dennis Wayne	M	4-23-48		Uintah
2263	277	Mojado, Lu Ann	F	7-2-50		Uintah
2262	278	Mojado, Mickey Lynn	M	8-19-51		Uintah
	279	Montes, Howard	M	11-31-17		Uintah
2261	280	Montes, Monte Ray	M	4-29-37		Uintah
	281	Montes, Joseph	M	1889		Uintah
	282	Montes, Betty Jo	F	8-18-36	MM	Uintah
1234	283	Montes, Helen Mary	F	12-22-48		Uintah
1235	284	Montes, Leonard Gene	M	3-30-44		Uintah

						BAND
1238	285	Montes, Roger Lynn	M	1-15-47		Uintah
1233	286	Montes, Charles Gail	M	10-4-50		Uintah
1237	287	Montes, Ralph	M	7-7-40		Uintah
2260	288	Montes, William	M	5-7-42		Uintah
	289	Montes, Thomas H.	M	12-13-13		Uintah
	290	Montes, Geneva Ellen	F	9-2-37	MM	Uintah
	291	Montes, Jeraldine	F	6-18-50		Uintah
	292	Montes, Thomas L.	M	7-21-46		Uintah
	293	M–ny, Amber Taylor	F	5-15-18		Uintah
	294	Murdock, Lula Harris	F	5-16-02		Uintah
2255	295	Murdock, Brenda Carol	F	6-29-40		Uintah
2254	296	Murdock, Karnel	M	10-10-46		Uintah
	297	Murdock, Gary	M	1-11-37	MM	Uintah
	298	Murdock, Mary Estella	F	4-24-39	MM	Uintah
2252	299	Murdock, Ronald Stanley	M	7-13-41		Uintah
—1	300	Murdock, Stuart	M	5-6-43		Uintah
	301	Murdock, —lla	M	4-1-28		Uintah

						BAND
	302	Murdock, — — Hack-ford	F	6-14-3_		Uintah
	303	Murdock, Benny	M	1-24-30		Uintah
	304	Murdock, Ora Pike	F	1902		Uintah
	305	Murray, Julius	M	7-17-09		Uintah
	306	Murray, John McConnell	M	7-30-11		Uintah
	307	Murray, Harris Marcell	M	10-4-05		Uintah
1293	308	Murray, Brian Gene	M	6-11-41		Uintah
1291	309	Murray, Annie Laurel	F	6-18-43	MM	Uintah
1295	310	Murray, David Marcell	M	7-19-45		Uintah
3644	311	Murray, Techumseh	M	1883		Uintah
	312	Mountain Lion, Howard	M	1-20-34		Whiteriver
	313	Neilsen, Christian P.	M	2-20-31		Uintah
	314	Neilsen, Norman V.	M	11-10-25		Uintah
	315	Neilsen, Lorraine R. Reed	F	7-12-28		Uintah
2250	316	Neilsen, Doyle Lee	M	7-31-50		Uintah

						BAND
2249	317	Neilsen, Norma Lorinda	F	7-29-52		Uintah
2248	318	Neilsen, Ilenna Janice	F	3-7-37	MM	Uintah
	319	Neilsen, Frances S. Allred	F	10-20-35		Uintah
	320	Neilsen, Seibert LaMarr	M	11-30-32		Uintah
	321	Oberhansley, Edith M. Denver	F	4-30-22		Uintah
	322	Oberhansley, Phyllis H. Daniels	F	10-23-16		Uintah
	323	Oberhansley, Sylvia –. Daniels	F	3-30-11		Uintah
	324	O'Neil, Ada L. Pike	F	5-2-10		Uintah
	325	O'Neil, —n	F	9-19-31		Uintah
	326	O'Neil, ReNae Darlene	F	7-25-30		Uintah
	327	Pantaloon, Cecelia	F	8-6-31		Unc.
	328	Pargeets, Alberta Elizabeth	F	1-23-39	MM	Uintah
	329	Peters, Geraldine Betty	F	10-21-32		Unc.

					BAND
	330	Peters, Pearl	F	3-28-29	Unc.
	331	Peters, Ray Jr.	M	4-29-26	Unc.
2247	332	Peters, -en-y -eginal-	F	10-26-53	Unc.
	333	Peters, Yvonne Delores	F	12-7-27	Unc.
	334	Peterson, Dorothy Jean Russell	F	9-17-31	Uintah
	335	Phillips, Margaret Reed	F	1-7-14	Uintah
3645	336	Phillips, Douglas M.	M	2-25-42	Uintah
3646	337	Phillips, Duane L.	M	7-9-44	Uintah
	338	Pike, Elvira	F	1886	Uintah
	339	Pike, Clyde	M	1899	Uintah
	340	Pike, Jasper	—	1—	Uintah
	341	Pike, Keith Aaron	M	6-12-36	Uintah
	342	Pike, Lawrence A.	M	11-7-21	Uintah
	343	Pike, Lawrence	M	1897	Uintah
	344	Pike, Lloyd Norman	M	12-2-15	Uintah
	345	Pike, Lina Louise	F	4-26-37	Uintah
	346	Pike, Loren Jasper	M	1-27-12	Uintah

						BAND
—7	347	Pikutark, LaVera	F	10-19-41		Uintah
	348	Purdy, Sylvia Hendricks	F	10-25-22		Uintah
	349	Reber, Idessa Hackford	F	5-24-30		Uintah
	350	Reed, Calvin Stacey	M	11-15-24		Uintah
	351	Reed, Charles E. Sr.	M	9-22-87	ESTATE	Uintah
	352	Reed, Charles E. Jr.	M	4-8-11	ESTATE	Uintah
	353	Reed, Charles T.	M	11-26-22		Uintah
	354	Reed, Glen V.	M	4-4-19		Uintah
	355	Reed, Glinnis Joan	F	7-2-39	MM	Uintah
—9	356	Reed, Judy Gay	F	3-7-45		Uintah
—2	357	Reed, Linda	F	5-19-48		Uintah
—4	358	Reed, Joelone	F	8-1-46		Uintah
—5	359	Reed, Marjorie Ellen	F	2-28-43		Uintah
	360	Reed, Robert Merle	M	1-18-37	MM	Uintah
—48	361	Reed, St-eart Eugene	M	7-20-40		Uintah
—46	362	Reed, Louis Russell	M	12-5-42		Uintah
—38	363	Reed, Ronald Le Roy	M	7-19-44		Uintah

						BAND
—39	364	Reed, Franklin Terry	M	10-7-46		Uintah
—45	365	Reed, Margaret Sue	F	11-15-48		Uintah
—37	366	Reed, Cordie Mae	F	10-13-50		Uintah
—44	367	Reed, Lawanna Kay	F	6-15-52		Uintah
	368	Reed, Julian P.	M	6-13-26		Uintah
	369	Reed, Shirley J. Murdock	F	1-21-35		Uintah
—92	370	Reed, Donald Ellis	M	3-31-45		Uintah
—94	371	Reed, Juliann	F	10-19-48		Uintah
	372	Reed, Katherine	F	3-19-32		Uintah
–634	373	Reed, Barbara Jean	F	1950		Uintah
	374	Kenneth Ferris	M	3-26-26		Uintah
	375	Reed, Wilson J.	M	12-28-16		Uintah
–641	376	Reed, James —	M	1-1-47		Uintah
–642	377	Reed, —ane —	—	—48		Uintah
	378	———	—	———		Uintah
	379	Reed, Stacey Robb Sr.	M	1902		Uintah
	380	Reed, Melvin	M	3-27-37	MM	Uintah
–494	381	Reed, Rita Jean	F	4-7-30	MM	Uintah
2267	382	Reed, Stacey Robb Jr.	M	6-19-40		Uintah

					BAND
2268	383	Reed, Martin	M	10-28-41	Uintah
2269	384	Reed, Beatrice Kay	F	12-8-43	Uintah
2270	385	Reed, Henry	M	8-20-45	Uintah
2271	386	Reed, Dennis	M	12-8-46	Uintah
2272	387	Reed, Clarinda –ee	F	5-28-48	Uintah
2273	388	Reed, Lara	F	7-12-49	Uintah
	389	Reed, –illie C.	M	1897	Uintah
	390	Reed, Gloria	F	12-23-37 MM	Uintah
2495	391	Reed, Reva Ellen	F	1-23-40	Uintah
2503	392	Reed, Beverly Ann	F	7-28-46	Uintah
	393	Reed, William James	M	7-11-36	Uintah
	394	Reyos, Anita Reed	F	12-23-20	Uintah
1655	395	Reyos, Annette Marie	F	5-23-39	Uintah
2204	396	Reyos, Pa-le Deane	M	9-22-41	Uintah
1660	397	Reyos, Robert Gerald	M	11-15-42	Uintah
1656	398	Reyos, Glenda Jane	F	8-23-44	Uintah
1659	399	Reyos, Paulette Jean	F	12-6-45	Uintah
1658	400	Reyos, Linda Carol	F	12-21-47	Uintah

					BAND
1657	401	Reyos, Kenneth Charles	M	10-13-50	Uintah
1654	402	Reyos, Allen —	M	7-30-52	Uintah
	403	Rhodd, Louise J. Reed	F	5-26-17	Uintah
2341	404	Rhodd, Louis Raymond	M	3-4-39	Uintah
2340	405	Rhodd, Charles Melvin	M	3-23-45	Uintah
	406	Richardson, Keith L.	F	1881	Uintah
	407	Richman, Lalean Neilsen	F	12-10-35	Uintah
	408	Rochelle, Clara Van	F	1894	Uintah
2456	409	Russell, Reuben L.	M	6-18-22	Uintah
	410	Secakuku, Josephine	F	9-16-24	Uintah
1798	411	Sireech, Le—ood V.	M	4-19-45	Unc.
	412	Sixkiller, Lana Denver	F	3-6-18	Uintah
2214	413	Sixkiller, Judith	F	4-11-40	Uintah
2215	414	Sixkiller, Grover Walter	M	2-9-42	Uintah
2216	415	Sixkiller, —ry	M	9-10-43	Uintah
2217	416	Sixkiller, — Jr.	—	———	Uintah

					BAND
2218	417	Sixkiller, Pearl Nadine	F	8-16-48	Uintah
2219	418	Sixkiller, Kathleen	F	5-19-50	Uintah
2222	419	Sixkiller, Jack	M	8-28-52	Uintah
—25	420	Sandoval, Laverne	F	5-28-52	Whiteriver
	421	Smith, Roy	M	1886	Uintah
	422	Smith, Illo Pigeon	F	2-28-26	Uintah
	423	Sprouse, Margaret Rose Van	F	3-22-36	Uintah
	424	Steward, Hilda Taylor	F	1904	Uintah
	425	Steward, Mabel Josephine	F	10-19-32	Uintah
	426	Steward, Frances P.	F	2-18-35	Uintah
	427	Sutteer, Irma H. Harris	F	6-13-15	Uintah
—05	428	Sutteer, James Charles	M	4-17-37	Uintah
—26	429	Sutteer, Barbara Ann	F	12-9-40	Uintah
	430	Taylor, –rlyn	M	7-27-12	Uintah
	431	Taylor, Claud	M	8-29-08	Uintah
–223	432	Taylor, Myra L.	F	3-10-41	Uintah
–229	433	Taylor, Dennis Lee	M	4-16-46	Uintah

						BAND
	434	Taylor, Ernest LeRoy	M	1-10-23		Uintah
	435	Taylor, Norman (Kenneth Jorgensen)	M	8-29-25	ESTATE	Uintah
	436	Taylor, Richard Donald	M	5-8-28		Uintah
–230	437	Taylor, Patricia Ann	F	2-23-46		Uintah
–231	438	Taylor, Richanda	F	7-2-49		Uintah
	439	Taylor, Wayne Robert	M	2-1-35		Uintah
	440	Taylor, William Jr.	M	1900		Uintah
–707	441	Thompson, Laura L. Workman	F	6-24-16		Uintah
	442	Thompson, Laura L. Pike	F	12-5-29		Uintah
–232	443	Valladolie, Rose	F	5-5-49		Unc.
–233	444	Valladolie, Toney	M	8-6-50		Unc.
–235	445	Valladolie, Lynn	M	6-20-51		Unc.
–237	446	Valladolie, Jessie Camphi-	M	3-30-53		Unc.
	447	Van, Alfonso	M	9-16-13		Uintah
	448	Van, Alfonso Jr.	M	8-14-35		Uintah

						BAND
–239	449	Van, Dora Mae	F	2-21-44		Uintah
	450	Van, Lenice Marie	F	5-24-31		Uintah
	451	Van, Chester Wayne	M	6-11-40	ESTATE	Uintah
	452	Van, Edmond Charles	M	12-11-36		Uintah
–2—	453	Van, Edmond —, Jr.	M	11-28-39		Uintah
	454	Van, Jerry	M	7—31		Uintah
	455	Van, John Edmond	M	8-3-22		Uintah
2241	456	Van, Shiril Lee	F	3-5-46		Uintah
	457	Van, Phillip Jr.	M	1904		Uintah
	458	Van, Wyona	F	8-10-11		Uintah
	459	Wallace, Minnie Walkington	F	9-18-24		Uintah
	460	Walkington, Dennis	M	8-11-28		Uintah
	461	Walkington, William Blake	M	9-28-30		Uintah
	462	Wardle, Orlean P. Reed	F	7-31-09		Uintah
	463	Watts, Clara J. Young	F	5-6-36		Uintah
	464	Wilkerson, Helen Harris	F	11-13-25		Uintah
	465	Winn, LaDonna Kolb	F	4-8-27		Uintah

					BAND
466	Wash, Lillie Reed	F	10-7-00		Uintah
467	Wopsock, Letha Harris	F	2-19-17		Uintah
468	Wopsock, Henry	M	7-20-07		Whiteriver
469	Workman, Chalmers Wilfird	M	2-1-16		Uintah
470	Workman, Colleen Adele	F	5-25-36		Uintah
471	Workman, David Harris	M	11-29-06		Uintah
472	Workman, Glenn Arthur	M	7-12-35		Uintah
473	Workman, Glenda May	F	4-24-32		Uintah
474	Workman, Joseph Arthur	M	7-2-09		Uintah
475	Workman, Max Harris	M	10-18-27		Uintah
476	Workman, Minnie Pike	F	1895		Uintah
477	Workman, Theresa Taylor	F	1-27-82	ESTATE	Uintah
478	Workman, William —.	M	5-22-22		Uintah
479	Wyasket, B—	M	1-15-22		Uintah
480	Wyasket, Christine Shavanaux	F	12-14-31		Uintah
481	Young, Boyd	M	4-2-30		Uintah

					BAND
482	Young, George Albert	M	7-17-28		Uintah
483	Young, Lillian Van	F	1901		Uintah
484	Young, Gloria	F	3-13-34		Uintah
485	Young, Nelson Roy	M	9-23-26		Uintah
486	Young, Ronald Oran	M	9-12-37	MM	Uintah
487	Young, Jolene Daniels	F	4-8-39	MM	Uintah
488	Zufelt, Adiah Harris	F	2-18-00		Uintah
489	Zufelt, Dolores Hackforzd	F	11-24-32		Uintah
490	Zuniga, Nola	F	4-22-43		Uintah

IN THE EIGHTH JUDICIAL DISTRICT COURT
OF UINTAH COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, vs. RICKIE L. REBER, Defendant.	Case No. 021800320 FS

Hearing
Electronically Recorded on
February 26, 2003

BEFORE: THE HONORABLE A. LYNN PAYNE
Eighth District Court Judge

APPEARANCES

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* * *

[5] MR. PETERSON: Well, your Honor, the Hagen standard as articulated was in the appellate court case, and that case was overruled – was set aside.

MR. HUMISTON: That portion of the appellate court was not overturned, your Honor. That part was not addressed and is still binding.

MR. PETERSON: And the position of the State is is that it – the Hagen appellate decision is not binding upon this Court and it's not good law, and it was set aside by the state Supreme Court.

MR. HUMISTON: That portion was not set aside by either the state Supreme Court or the federal – or the United States Supreme Court. Unless there is an intervening state ruling I believe that –

THE COURT: There isn't anything to – there isn't anything for me to decide if your analysis is correct. All I have to decide is whether or not they're a federally recognized tribe and they don't claim to be a federally recognized tribe. So that's the beginning and the end of it.

MR. PETERSON: Yes, that's what the La Pierre decision says.

MR. HUMISTON: Your Honor, the law that's binding upon [6] this state through the 10th Circuit – through the 9th Circuit, in fact, which was where the La Pierre decision came from is that for hunting and fishing purposes a tribe does not have to be federally recognized. That is the standing law of the United States of the two circuits with all the Indians, the 9th and 10th Circuit. That is also the law –

THE COURT: Well, that's not binding upon this Court.

MR. HUMISTON: It is – Mr. Conway is a privy to the State of Utah and that ruling is binding. That's now res judicata upon this court.

THE COURT: Federal cases are never binding upon the state court unless they're United States Supreme Court cases. As a matter of law they're not.

MR. HUMISTON: As far as Indian law is exclusive, and under state law – under the state constitution the state – congress and the federal courts reserve – retain exclusive jurisdiction over Indian affairs.

THE COURT: Well, it's just – it just isn't the case that federal law and federal decisions are binding upon state courts. That's just not the law.

MR. HUMISTON: We must have gone to different law schools, then.

THE COURT: Well, I guess we did. If that were the case, if you'll go back historically, which was the decision that went to the United States Supreme Court?

[7] MR. PETERSON: Hagen.

THE COURT: Hagen. You had a preexisting federal 10th Circuit decision.

MR. HUMISTON: Yes.

THE COURT: And then you had the Utah Supreme Court taking a directly conflicting decision, and if the – and if you get into this area very deeply you will see, as is evident from the Hagen case, that the 10th

Circuit Court decisions are not binding. They are legal precedents, but they are not binding like I am bound to follow the appellate court decisions of the State of Utah.

MR. HUMISTON: Your Honor, I am extremely familiar with this area. The Ute tribe had the opportunity to assert the 10th Circuit ruling as res judicata before the Utah Supreme Court, and the record is very clear before that court that they looked at the parties and said, "Since you have not asserted that as res judicata we are not going to look at it," and the US Supreme Court record was equally clear that "we don't know why they didn't assert it as res judicata because it is, but since they have not made that argument we are not going to apply it for them."

THE COURT: No, and I'm –

MR. HUMISTON: That's what the ruling says, your Honor.

THE COURT: I disagree. I'm not bound to follow the 10th Circuit.

MR. HUMISTON: But you –

[8] THE COURT: It's legal precedent, but I'm not bound to follow it in the way I'm bound to follow the Supreme Court or –

MR. HUMISTON: Is there a reason then why the State of Utah would go before the 10th Circuit and argue it if they're not even bound by that court?

THE COURT: Well, I'm not State of Utah. The State of Utah is a party in this Court, but this Court is not the State of Utah.

MR. HUMISTON: I realize that, your Honor. What I'm saying is the State of Utah as represented by Mr. Peterson is bound by the rulings of the 10th Circuit.

THE COURT: As to what specifically?

MR. HUMISTON: As to rulings to which they are a party. When the attorney general of the State of Utah goes to Denver and argues on behalf of the State of Utah before the 10th Circuit, if the 10th Circuit had no precedent for the State of Utah, there would be no need for him to be there.

THE COURT: Specifically, though, what are you asking me to – what do you think this Court is bound to by the 10th Circuit?

MR. HUMISTON: The ruling that a tribe does not have to be federally recognized in order to assert treaty hunting and fishing rights.

THE COURT: No, I don't think I'm bound to follow that.

MR. HUMISTON: Well, do you believe Mr. Conway is bound [9] to follow that?

THE COURT: I don't know who Mr. Conway is.

MR. HUMISTON: Mr. Conway is the Utah Director of Wildlife Resources who is a party to that lawsuit and a party to that ruling. Do you believe he is bound by that ruling?

THE COURT: I don't know about Mr. – I mean what does he have to do with this case?

MR. HUMISTON: Well, you're presenting the proposition that a ruling to which the State of Utah is a party is not binding upon the State of Utah. Now Mr. Conway is not the State of Utah, he is a privy of the State of Utah. He is an agent of the State of Utah. So as a general proposition of law, a ruling described by the 10th Circuit as *Timpanogos Tribe vs. Conway* to which Mr. Conway is a party is binding upon the parties to that action, would that ruling not be binding upon Mr. Conway?

THE COURT: If you are saying that the principle of res judicata apply, and that is is that parties who have litigated a case fully in another jurisdiction are bound by that, I may agree with you. But if you are saying that I need to follow the law as pronounced by the 10th Circuit blindly – in other words say they have come up with a particular ruling in another case not involving other of the same parties, then I disagree with you.

MR. HUMISTON: But then by the same token the 9th circuit La Pierre ruling is equally unbinding upon this Court.

THE COURT: I don't think it is binding.

[10] MR. HUMISTON: Well, and I agree. Apparently the Court was going the direction that the lower court ruling in Hagen to the extent it is overruled is still applicable. I certainly have submitted that on my briefs and that –

THE COURT: I'll have to go back and read the Supreme Court case in Hagen, which I haven't had an opportunity to do. I don't know. I don't know. Mr. Peterson tells me that the whole thing was overruled, and I don't know that that's the case.

MR. HUMISTON: It's not.

THE COURT: But I am bound to follow the law as pronounced by the appellate courts in the State of Utah, even though if I were left to my own devices I'm – in particular cases. I'm not talking about this case. I'm just not free to make up my mind on issues that have been settled in the State of Utah by the appellate courts.

That's not true – that's not true as to federal courts. It may be settled in the federal court in other cases, I'm not bound to follow those. If you're saying that principles of res judicata where a particular party has litigated an issue fully in another jurisdiction, are they bound by principles of res judicata, maybe. You may be correct on that. I get – we got far off the subject of that.

* * *

J. Reuel Armstrong, Solicitor, *Memorandum to Commissioner of Indian Affairs, Re: Interpretation of Section 4 of the Act of August 27, 1954 (68 Stat. 868)*, M-36305, September 21, 1955.

You have requested my opinion on the power of the Secretary to transfer a minor from the proposed full-blood roll to the mixed-blood roll upon application of the parent for himself and his minor children, pursuant to section 4 of the Act of August 27, 1954, Public Law 671-83rd Congress (68Stat. 868). [25 U.S.C. 677c].

Section 4 states that any member of the tribe whose name appears on the proposed roll of full-blood members may apply to the Superintendent to become identified with and part of the mixed-blood roll *provided* that before such transfer is made the Secretary shall first certify that in his opinion such change in status is not detrimental to the best interests of the applicant. The provisions of the Act are silent with respect to the transfer of a minor to the mixed-blood roll. In this regard it differs from the Klamath Withdrawal Act of August 13, 1954 (68 Stat. 718) which specifically gives the head of the family the right to file for himself and his minor children an election to withdraw from the tribe.

Section 22 provides for the protection by the Secretary of the rights of minors and other members of the tribe in need of assistance and, further, that the appointment of guardians pursuant to State law will not be required until Federal supervision has terminated. The indications of this section and other provisions of the Act are that this protection was intended for the benefit of members of the mixed-blood roll. The restrictions on their trust and redestricted property are to terminate in accordance with

Section 16 and the assets of the mixed-blood group are to be distributed to the individual members under Section 13.

It was apparent that the Act would result in some members of a family being placed on the full-blood roll and others on the mixed-blood roll. If it were contemplated that the integrity of the family was to be maintained with respect to their membership some provision it seems would have at least been made allowing members of a family to transfer from the mixed-blood roll to the full-blood roll. An examination of the legislative history of the Act is of no aid on the question posed. In the absence of any express language in the Act or Congressional intent shown in its legislative history it must be concluded that the Secretary does not have such power, particularly when a transfer of a minor from the full-blood to the mixed-blood roll would result in the taxation and removal of restrictions on his trust and restricted property and in loss of the right in Section 23 to share in Federal services available to Indians because of their status as Indians.